STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

McLeodUSA Telecommunications Services, Inc.	)	
	)	
vs.	)	Docket 05-0174
	)	(Consolidated with
Illinois Bell Telephone Company	)	Dockets 05-0154
d/b/a SBC Illinois	)	and 05-0156)
	)	
Complaint pursuant to 220 ILCS 5/13-515.	)	

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.'S INITIAL BRIEF

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April 18, 2005

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I. INTRODUCTION

This case is a Complaint brought by McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") against Illinois Bell Telephone Company ("SBC" or "SBC Illinois"), pursuant to Section 13-515 of the Illinois Public Utilities Act ("PUA"), for violations by SBC of Section 13-514 of the PUA and relief authorized by Section 13-516 of the PUA.[1] McLeodUSA's complaint docket has been consolidated with two essentially similar complaint cases brought by a total of six other competitive local exchange carriers ("competitive LECs" or "CLECs") against SBC Illinois (Dockets 05-0154 and 05-0156). As detailed below, McLeodUSA provides telecommunications services to retail customers in Illinois in competition with SBC, using McLeodUSA's own facilities and certain unbundled network elements ("UNEs") purchased from SBC pursuant to an Interconnection Agreement ("ICA") that was negotiated by the parties and approved by this Commission pursuant to Section 252 of the federal Communications Act ("Act"), 47 U.S.C. §252.[2]

McLeodUSA's Complaint (and the other two, consolidated complaint cases) arise out of the issuance of the Federal Communications Commission's ("FCC") *Triennial Review Remand Order* ("TRRO" or "TRO Remand Order")[3] and, more particularly, the actions threatened by SBC purportedly to implement the TRRO. In the TRRO, the FCC announced amended unbundling rules including new "impairment" criteria for determining whether incumbent local

[1] 220 ILCS 13-514, 13-515 and 13-516.

[2] The current ICA between McLeodUSA and SBC Illinois was approved by the Commission in Docket 02-0230. (Certain provisions in the ICA resulted from an arbitration between the parties in Docket 01-0623.) A total of four amendments to the ICA have been negotiated and approved by the Commission, in Dockets 02-0416, 03-0502, 04-0119 and 04-0589.

[3] *In the Matter of Unbundled Access to Network Elements*, WC Docket 04-0313, *Review of the Section 251 Unbundling Obligations of Incumbent Local exchange Carriers*, CC Docket 01-0338, Order on Remand, FCC 04-0290 (rel. Feb. 4, 2005).

exchange carriers ("competitive LECs" or "ILECs") such as SBC Illinois are required to provide certain UNEs to CLECs pursuant to Section 251(c) of the federal Act.[4] In summary (and as pertinent to McLeodUSA's Complaint), the FCC announced that (1) ILECs would no longer be obligated to provide "mass market" unbundled local switching ("ULS") to CLECs[5]; (2) ILECs would no longer be obligated to provide unbundled DS1 or DS3 local loops to CLECs in ILEC wire centers meeting certain specified criteria; and (3) ILECs would no longer be obligated to provide unbundled dedicated interoffice transport to CLECs on routes between ILEC wire centers both of which meet certain specified criteria. However, the FCC also directed in the TRRO that "We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order." (TRRO, ¶233) The FCC also specified that "the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes." (*Id.*)

In response to the TRRO, SBC issued "Accessible Letters" ("ALs") to CLECs, including McLeodUSA, stating that, among other things, as of the date on which the FCC stated the new rules promulgated in the TRRO would become effective (March 11, 2005), SBC would no longer accept, but rather would reject, CLECs' orders for (1) New, Migration or Move Local Service Requests ("LSRs") for ULS and the UNE-Platform ("UNE-P"); (2) New, Migration or Move LSRs for unbundled DS1 and DS3 local loops at wire centers that SBC determined meet the criteria specified in the TRRO; and (3) New, Migration or Move LSRs for unbundled DS1 and

[4] 47 U.S.C. §251(c).

[5] "Mass Market" ULS refers to the use of unbundled local switching to serve end user customers using DS0 capacity loops. (See 47 C.F.R. §51.319(d)(2)(i).)

DS3 dedicated interoffice transport between wire centers SBC determined meet the criteria specified in the TRRO.[6] Moreover, SBC advised McLeodUSA (and other CLECs) that SBC would cease to accept orders for the affected UNEs on and after March 11 "notwithstanding interconnection agreements or applicable tariffs."[7]

As detailed herein, SBC's announced unilateral implementation of the TRRO's new impairment criteria to deny McLeodUSA access to UNEs to which McLeodUSA is entitled pursuant to both the parties' ICA and applicable State and federal law, prior to negotiation of necessary, conforming amendments to the ICA between McLeodUSA and SBC, violates the parties' ICA, Section 252 of the Act, and other provisions of law under which SBC is required to make these UNEs available to McLeodUSA and other CLECs. Further, SBC's unilateral actions, unless prevented by this Commission, will result in injury to McLeodUSA and its ability to provide service to customers, to the competitive telecommunications markets in Illinois, and to the public. SBC's actions would be particularly detrimental to the interests of Illinois telecommunications customers in SBC exchanges outside of Chicago, especially in downstate areas, where McLeodUSA is the principal competitive alternative to SBC.

The facts and the law demonstrate that SBC's threatened actions violate Section 13-514 of the PUA, and the relief requested by McLeodUSA and the other complainants in these consolidated dockets should be granted by the Commission.

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[6]SBC AL CLECALL05-017, 05-018, 05-019 and 05-020 (Ex. A to McLeodUSA's Complaint). In this brief, references to paragraphs of or exhibits to the "Complaint" means to McLeodUSA's Complaint in Docket 05-0174. Any references to the complaints filed in Dockets 05-0154 or 05-0156 or to exhibits to those complaints will be expressly identified as such.

[7]SBC AL CLECALL05-019 (Ex. B to Complaint); SBC letter to McLeodUSA, March 1, 2005 (Ex. C to Complaint).

II. STATUTES INVOLVED

McLeodUSA's Complaint (and the complaints in the other two consolidated dockets) have been brought pursuant to Section 13-515 of the PUA, alleging violations of Section 13-514 and seeking relief authorized by Section 13-516. (220 ILCS 5/13/-514, 13-515, 13-516). Section 13-514, "Prohibited Actions of Telecommunications Carriers", is the substantive statutory provision on which the complaints are based. It states as follows:

> Sec. 13-514. Prohibited Actions of Telecommunications Carriers. A telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. The following prohibited actions are considered per se impediments to the development of competition; however, the Commission is not limited in any manner to these enumerated impediments and may consider other actions which impede competition to be prohibited:
>
> (1) unreasonably refusing or delaying interconnections or collocation or providing inferior connections to another telecommunications carrier;
>
> (2) unreasonably impairing the speed, quality, or efficiency of services used by another telecommunications carrier;
>
> (3) unreasonably denying a request of another provider for information regarding the technical design and features, geographic coverage, information necessary for the design of equipment, and traffic capabilities of the local exchange network except for proprietary information unless such information is subject to a proprietary agreement or protective order;
>
> (4) unreasonably delaying access in connecting another telecommunications carrier to the local exchange network whose product or service requires novel or specialized access requirements;
>
> (5) unreasonably refusing or delaying access by any person to another telecommunications carrier;
>
> (6) unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers;
>
> (7) unreasonably failing to offer services to customers in a local exchange, where a telecommunications carrier is certificated to provide service and has entered into an interconnection agreement for the provision of local exchange telecommunications services, with the intent to delay or impede the ability of the

> incumbent local exchange telecommunications carrier to provide inter-LATA telecommunications services;
>
> (8) violating the terms of or unreasonably delaying implementation of an interconnection agreement entered into pursuant to Section 252 of the federal Telecommunications Act of 1996 in a manner that unreasonably delays, increases the cost, or impedes the availability of telecommunications services to consumers;
>
> (9) unreasonably refusing or delaying access to or provision of operation support systems to another telecommunications carrier or providing inferior operation support systems to another telecommunications carrier;
>
> (10) unreasonably failing to offer network elements that the Commission or the Federal Communications Commission has determined must be offered on an unbundled basis to another telecommunications carrier in a manner consistent with the Commission's or Federal Communications Commission's orders or rules requiring such offerings;
>
> (11) violating the obligations of Section 13-801; and
>
> (12) violating an order of the Commission regarding matters between telecommunications carriers.

In these cases, complainants allege that SBC's actions violate subsections (1), (2), (4), (5), (6), (8), (10), (11) and (12) of Section 13-514.

Section 13-515, "Enforcement", sets forth procedures for enforcing the provisions of Section 13-514, and will not be set forth in full text here. Section 13-516, "Enforcement remedies for prohibited actions by telecommunications carriers", sets forth in subsection (a) remedies ("in addition to any other provisions of [the PUA]") that "may be applied for violations of Section 13-514", including: "(1) a Commission order directing the violating telecommunications carrier to cease and desist from violating the Act or a Commission order or rule." In addition, Section 13-516(a)(3) provides:

> (3) The Commission shall award damages, attorney's fees, and costs to any telecommunications carrier that was subject to a violation of Section 13-514.

These cases also involve SBC's and the complainants' rights and obligations under Sections 251 and 252 of the federal Act, 47 U.S.C. §§251-252. Section 251(a) states that "each telecommunications carrier has the duty (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carrier . . . ." Section 251(c) imposes certain duties on ILECs, including:

> (1) DUTY TO NEGOTIATE – The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in subsections (1) through (5) of subsection (b) [i.e., §251(b)(1) – (5)] and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

Sections 251(c)(2) through (6) impose duties on an ILEC to provide to a requesting telecommunications carrier (2) interconnection, (3) nondiscriminatory access to UNEs, (4) resale at wholesale rates of the ILEC's retail services, (5) reasonable public notice of changes in certain information relating to the ILEC's network, and (6) collocation of the requesting carrier's equipment necessary for interconnection with or access to UNEs from the ILEC.

Section 252 of the Act specifies requirements for negotiation and arbitration of ICAs. In particular, Section 252(a) states:

> (1) VOLUNTARY NEGOTIATIONS – Upon receiving a request for interconnection, services or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

Section 252(e)(1) provides:

> (1) APPROVAL REQUIRED – Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State

> commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.[8]

The complaints also involve obligations of SBC under other provisions of both the PUA and the federal Act. With respect to the PUA, these cases involve SBC's obligations under Section 13-801 (220 ILCS 5/13-801).[9] Section 13-801 states, in part:

> Sec. 13-801. Incumbent local exchange carrier obligations.
>
> (a) This Section provides additional State requirements contemplated by, but not inconsistent with, Section 261(c) of the federal Telecommunications Act of 1996, and not preempted by orders of the Federal Communications Commission. A telecommunications carrier not subject to regulation under an alternative regulation plan pursuant to Section 13-506.1 of this Act shall not be subject to the provisions of this Section, to the extent that this Section imposes requirements or obligations upon the telecommunications carrier that exceed or are more stringent than those obligations imposed by Section 251 of the federal Telecommunications Act of 1996 and regulations promulgated thereunder.
>
> An incumbent local exchange carrier shall provide a requesting telecommunications carrier with interconnection, collocation, network elements, and access to operations support systems on just, reasonable, and nondiscriminatory rates, terms, and conditions to enable the provision of any and all existing and new telecommunications services within the LATA, including, but not limited to, local exchange and exchange access. The Commission shall require the incumbent local exchange carrier to provide interconnection, collocation, and network elements in any manner technically feasible to the fullest extent possible to implement the maximum development of competitive telecommunications services offerings. As used in this Section, to the extent that interconnection, collocation, or network elements have been deployed for or by the incumbent local exchange carrier or one of its wireline local exchange affiliates in any jurisdiction, it shall be presumed that such is technically feasible in Illinois. . . .

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[8]The McLeodUSA-SBC Illinois ICA expressly provides: "The Parties understand and agree that this Agreement and any amendment or modification hereto will be filed with the Commission [defined in the ICA as the ICC] for approval in accordance with Section 252 of the Act . . . ", and that "The rates, terms and conditions in [an] amendment shall become effective upon approval of such amendment by the appropriate Commissions." (ICA Appendix GT&C, §§23.1 and 44.1 (McLeodUSA Ex. 3))

[9]As shown in the quotation of Section 13-514 of the PUA, above, one of the "prohibited actions of telecommunications carriers" specified in that Section is "(11) violating the obligations of Section 13-801".

(d) Network elements. The incumbent local exchange carrier shall provide to any requesting telecommunications carrier, for the provision of an existing or a new telecommunications service, nondiscriminatory access to network elements on any unbundled or bundled basis, as requested, at any technically feasible point on just, reasonable, and nondiscriminatory rates, terms, and conditions.

(1) An incumbent local exchange carrier shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine those network elements to provide a telecommunications service.

(2) An incumbent local exchange carrier shall not separate network elements that are currently combined, except at the explicit direction of the requesting carrier.

(3) Upon request, an incumbent local exchange carrier shall combine any sequence of unbundled network elements that it ordinarily combines for itself, including but not limited to, unbundled network elements identified in The Draft of the Proposed Ameritech Illinois 271 Amendment (12A) found in Schedule SJA-4 attached to Exhibit 3.1 filed by Illinois Bell Telephone Company on or about March 28, 2001 with the Illinois Commerce Commission under Illinois Commerce Commission Docket Number 00-0700. The Commission shall determine those network elements the incumbent local exchange carrier ordinarily combines for itself if there is a dispute between the incumbent local exchange carrier and the requesting telecommunications carrier under this subdivision of this Section of this Act.

The incumbent local exchange carrier shall be entitled to recover from the requesting telecommunications carrier any just and reasonable special construction costs incurred in combining such unbundled network elements (i) if such costs are not already included in the established price of providing the network elements, (ii) if the incumbent local exchange carrier charges such costs to its retail telecommunications end users, and (iii) if fully disclosed in advance to the requesting telecommunications carrier. The Commission shall determine whether the incumbent local exchange carrier is entitled to any special construction costs if there is a dispute between the incumbent local exchange carrier and the requesting telecommunications carrier under this subdivision of this Section of this Act.

(4) A telecommunications carrier may use a network elements platform consisting solely of combined network elements of the incumbent local exchange carrier to provide end to end

> telecommunications services for the provision of existing and new exchange, interexchange that includes local, local toll, and intraLATA toll, and exchange access telecommunications services within the LATA to its end users or payphone service providers without the requesting telecommunications carrier's provision or use of any other facilities or functionalities. . . .

"Schedule SJA-4", referred to in Section 13-801(d)(3) above, provides as follows:

> Ameritech will make available the following Combinations: i) pre-existing or already assembled combinations of unbundled local loops, unbundled local switching ports and shared transport, known as pre-existing UNE Platform, or UNE-P; ii) new or newly-assembled combinations of certain unbundled local loops, unbundled local switching ports and shared transport, known as New UNE-P; and iii) certain new or newly assembled combinations of unbundled local loops and dedicated interoffice transport, known as Enhanced Extended Loop or EELs. (Joint Compl. Ex. 5.10)[10]

These complaints also involve SBC's obligations under Section 271 of the federal Act (47 U.S.C. §271). Section 271 specifies conditions that SBC Illinois, as a "Bell operating company" ("BOC"), was required to meet in order to be granted authority to provide in-region interLATA services, which the federal Act otherwise prohibits BOCs from providing. Section 271(c)(1)(A) specifies that the BOC must have entered into "binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers." Pursuant to Section 271(c(2)(A)(ii), those agreements must provide access to facilities that meet the requirements of the "competitive checklist" set forth in Section 271(c)(2)(B). The "competitive checklist" requires that the binding agreements must provide for access to "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services" (§271(c)(2)(B)(iv)), "local

[10]"Joint Compl." or "Joint Complainants" exhibits refers to exhibits filed by the Joint Complainants Cbeyond Communications LLP, et al., in Docket 05-0154.

switching unbundled from transport, local loop transmission or other services" (§271(c)(2)(B)(vi)), and "local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services" (§271(c)(2)(B)(v)).

III. FACTUAL BACKGROUND

A. McLeodUSA's Retail Telecommunications Business in Illinois and Its Use of the UNEs Purchased from SBC Pursuant to the Parties' Interconnection Agreement

McLeodUSA is a full service provider of local, long distance and advanced telecommunications services to both residential and business retail customers in virtually all geographic areas in Illinois served by SBC. McLeodUSA has been providing local service to customers in Illinois since 1994. McLeodUSA offers Illinois residence and business customers a competitive alternative to SBC in all three SBC Access Areas and in virtually every SBC exchange (a total of 2,013 SBC exchanges) in Illinois. McLeodUSA's marketing and customer base are particularly significant in SBC Access Area C, which constitutes the SBC Illinois service area outside the greater Chicago metropolitan area. (McLeodUSA Ex. 1, pp. 2-3) Presently, McLeodUSA is serving approximately 116,000 customer access lines in Illinois, including about 24,000 residence lines and about 92,000 business lines. About 3% of McLeodUSA's lines are in Access Area A (downtown Chicago), 17% are in Access Area B (metropolitan areas surrounding downtown Chicago), and 80% are in Access Area C. McLeodUSA believes that at this time it is one of the leading, if not the leading, alternatives to SBC available to both residence and business telecommunications customers in Illinois, particularly in Access Area C. (*Id.*, p. 3)

McLeodUSA is primarily a facilities-based carrier. McLeodUSA has installed its own switches in Illinois and contiguous states which it uses to serve customers in Illinois. McLeodUSA has also installed and operates some 2,800 route miles of fiber optic cable facilities

for dedicated interoffice transport in Illinois, with most of these transport facilities being located outside the Chicago metropolitan area. (McLeodUSA Ex. 1, pp. 3-4) However, although McLeodUSA serves about 85% of its customer lines in Illinois using its own switching and unbundled local loops purchased from SBC, McLeodUSA serves almost all of the remaining 15% of its access lines in Illinois using the UNE-P combination purchased from SBC. Most of the SBC exchanges in which McLeodUSA uses UNE-P are in Access Area C (i.e., downstate Illinois areas). (*Id*., p. 4)

In additional to leasing unbundled DS0 loops from SBC to serve residential customers, McLeodUSA leases unbundled DS1 and DS3 loops (sometimes referred to as high capacity loops) to service business customers. High capacity loops are used to provide service to even relatively small business customers that have a need for approximately six lines. Presently, McLeodUSA is leasing approximately 1100 DS1 loops and four DS3 loops from SBC. (McLeodUSA Ex. 1, pp. 4-5) Of these unbundled high capacity loops, approximately 107 (about 10%) are located in wire centers that will not meet the new impairment criteria specified in the TRRO.[11] (*Id*., p. 5)

Finally, while McLeodUSA has its own extensive fiber optic network in Illinois, it is necessary for McLeodUSA to obtain some unbundled dedicated transport facilities from SBC. Presently, McLeodUSA leases approximately 215 DS1 and DS3 transport facilities from SBC in

[11]This count is based on the wire centers that SBC contends will not meet the TRRO's new impairment criteria for unbundled high capacity loops. Based on review of data from a third-party data source, Dun & Bradstreet, McLeodUSA believes that a few of the wire centers listed by SBC as not meeting the TRRO's impairment criteria do in fact meet those criteria. (McLeodUSA Ex. 1, pp. 5-6; Ex. B to Complaint, p. 2) While this discrepancy does not need to be resolved for purposes of adjudicating this complaint case, the discrepancy is illustrative of matters that need to be resolved between McLeodUSA and SBC through negotiations and embodied in an amendment to their ICA before the TRRO's new impairment criteria can be implemented between McLeodUSA and SBC.

Illinois. (McLeodUSA Ex. 1, p. 5) SBC's list of the transport routes in Illinois that will not meet the TRRO's new impairment criteria for unbundled DS1 and DS3 transport includes 32 routes on which McLeodUSA is currently leasing unbundled transport from SBC. (*Id*., p. 6)

McLeodUSA obtains the aforementioned UNEs from SBC pursuant to its ICA with SBC. Unbundled local loops, including DS1 and DS3 loops, are provided pursuant to Section 7.2 of Appendix UNE of the ICA (McLeodUSA Exhibit 5).[12] ULS is provided pursuant to Section 11 of Appendix UNE. Unbundled dedicated interoffice transport is provided pursuant to Section 13.2 of Appendix UNE. Pricing for UNEs obtained by McLeodUSA pursuant to the ICA is specified in the Pricing Schedule for UNEs to the ICA (McLeodUSA Ex. 7). In addition, Section 5.7.2 of Appendix GT&C of the ICA (McLeodUSA Ex. 3) provides:

> If **SBC-AMERITECH** has approved tariffs on file for interconnection or wholesale services, CLEC may purchase services from **SBC-13STATE** from this interconnection agreement, the approved tariffs or both in its sole discretion.

Thus, the SBC-McLeodUSA expressly recognizes that McLeodUSA may also purchase UNEs from SBC Illinois to the extent the UNEs are available under tariffs that SBC has on file with this Commission.

B. SBC's Accessible Letters Threatening to Unilaterally Implement the New Impairment Rules Announced in the TRRO, Beginning March 11, 2005, Without Negotiating Amendments to ICAs

The FCC issued the TRRO on February 4, 2005, stating that the effective date of the rules announced in the TRRO would be March 11, 2005. On or about February 11, 2005, SBC issued

[12]The SBC McLeodUSA ICA, consists, in the usual SBC ICA format, of a series of appendices and schedules. Several of these have been provided as exhibits: Appendix GT&C (General Terms & Conditions) (McLeodUSA Ex. 3); Appendix Merger Conditions (McLeodUSA Ex. 4); Appendix UNE (McLeodUSA Ex. 5); Appendix Pricing (McLeodUSA Ex. 6); Pricing Schedule for UNEs (Appendix 7); and Appendix Resale (McLeodUSA Ex. 8). The ICA in general, and several of these Appendices in particular, have provisions that pertain to other states in addition to Illinois and contain some provisions that are unique to Illinois (or to the "Ameritech" region) as well as provisions that pertain only to other SBC states or regions and not to Illinois.

certain Accessible Letters in which it made certain pronouncements concerning the TRRO and advised McLeodUSA and other CLECs as to how SBC intended to implement the amended unbundling rules announced in the TRRO. Specifically, SBC declared that effective March 11, 2005, it would no longer accept new orders for Mass Market ULS and UNE-P, and would not accept orders for unbundled DS1 and DS 3 local loops and interoffice transport for wire centers that SBC determined did not meet the new "impairment" criteria announced in the TRRO. These Accessible Letters are identified as AL CLECALL05-017 through CLECALL05-020. (See Ex. A to Complaint.[13])

In AL CLECALL05-017, which pertained to Mass Market ULS/UNE-P, SBC announced:

> As set forth in the TRO Remand Order, specifically in Rule 51.319(d)(2), as of March 11, 2005, CLECs "may not obtain," and SBC and other ILECs are not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops. Therefore, CLECs may not place, and SBC will no longer provision New, Migration or Move Local Service Requests (LSRs) for Mass Market Local Switching and the UNE-P.
>
> Accordingly, as of the effective date of the TRO Remand Order, i.e., March 11, 2005, CLECs are no longer authorized to place, nor will SBC accept, New (including new lines being added to existing Mass Market Unbundled Local Switching/UNE-P accounts), Migration or Move LSRs for Mass Market Local Switching/UNE-P. **Any New, Migration or Move LSRs placed for Mass Market Unbundled Local Switching/UNE-P after March 11, 2005 will be rejected. The effect of the TRO Remand Order on New, Migration or Move LSRs for Mass Market Unbundled Local Switching/UNE-P is operative notwithstanding interconnection agreements or applicable tariffs.** (emphasis added)

In AL CLECALL05-018, also pertaining to Mass Market ULS/UNE-P, SBC similarly announced:

[13]For reference, other complainants have also placed these Accessible Letters into the record. See, e.g., Joint Complainants Exhibits 5.1 through 5.4.

> [A]s of the effective date of the TRO Remand Order, i.e., March 11, 2005, you are no longer authorized to send, and SBC will no longer accept, New (including new lines being added to existing Mass Market Unbundled Local Switching/UNE-P accounts), Migration or Move LSRs for Mass Market Unbundled Local Switching/UNE-P. **Any New, Migration or Move LSRs placed for Mass Market Unbundled Local Switching/UNE-P on or after the effective date of the TRO Remand Order will be rejected.** (emphasis added)

In AL CLECALL05-019, which pertained to Unbundled High-Capacity Loops and Unbundled Dedicated Transport, SBC announced to McLeodUSA and other CLECs:

> As set forth in the TRO Remand Order, specifically in Rule 51.319(a)(6), as of March 11, 2005, CLECs "may not obtain," and SBC and other ILECs are not required to provide access to Dark Fiber Loops on an unbundled basis to requesting telecommunications carriers. The TRO Remand Order also finds, specifically in Rules 51.319(a)(4), (a)(5) and 51.319(e), that, as of March 11, 2005, CLECs "may not obtain," and SBC and other ILECs are not required to provide access to DS1/DS3 Loops or Transport or Dark Fiber Transport on an unbundled basis to requesting telecommunications carriers under certain circumstances. **Therefore, as of March 11, 2005, in accordance with the TRO Remand Order, CLECs may not place, and SBC will no longer provision New, Migration or Move Local Service requests (LSRs) for affected elements.**

Similarly, in AL CLECALL05-020, which also pertained to Unbundled High-Capacity Loops and Unbundled Dedicated Transport, SBC announced to McLeodUSA and other CLECs that as of March 11, 2005, SBC would reject orders for unbundled DS1 and DS3 loops and dedicated interoffice transport for wire centers and routes where SBC believed the TRRO has relieved SBC of its obligation to make these UNEs available to CLECs:

> As explained in CLECALL05-019, as of the effective date of the TRO Remand Order, i.e., March 11, 2005, **you are no longer authorized to send, and SBC will no longer accept, New, Migration or Move LSRs for unbundled high-capacity loops or transport, as is more specifically set forth in that Accessible Letter, and such orders will be rejected.** (emphasis added)

Additionally, in each of CLECALL05-018 and CLECALL05-020, SBC announced that CLECs should access and download from SBC's CLEC website, and execute and return, amendments prepared by SBC to the CLECs' ICAs to reflect changes to the ICAs that SBC

claims are required by the TRRO with respect to Mass Market ULS/UNE-P and unbundled high capacity loops and unbundled dedicated interoffice transport.[14] (McLeodUSA Ex. 2, p. 3) The Accessible Letters did not state that SBC would continue to provide access to these UNEs in accordance with ICAs until the amendments, or any revised versions of the amendments resulting from negotiations, were executed by the parties and approved by the State commission. Rather, as the quotes from SBC's Accessible Letters set forth above show, SBC made it clear that its refusal to accept New, Migration or Move LSRs for the subject UNEs on and after March 11, 2005 "is operative notwithstanding interconnection agreements or applicable tariffs."

C. McLeodUSA's Request for Good Faith Interconnection Agreement Negotiations Under Section 252 of the Act and Paragraph 233 of the TRRO and SBC's Response

On February 22, 2005, following receipt and review of SBC's February 11 Accessible Letters, McLeodUSA made a formal written request to SBC for negotiations to establish amendments to the McLeodUSA-SBC ICA to incorporate any changes necessary as a result of the TRRO.[15] (McLeodUSA Ex. 2, pp. 3-4) In its February 22, 2005 letter to SBC, McLeodUSA stated:

> This letter responds to SBC's Accessible Letters (CLECALL05-017 thru 019) that purport to implement the FCC's Triennial Review Remand Order ("TRRO"). McLeodUSA disagrees with SBC's interpretation of that order [the TRRO] in terms of implementation of the revisions to the revised unbundling rules.
>
> In the *Triennial Review Order* ("TRO") (paras. 700-705), the FCC clearly stated that new UNE rules were to be implemented through modifications to interconnection agreements.[16] Nothing in the TRRO departs from this traditional

[14]SBC's proposed form of amendments were embedded in AL CLECALL05-018 and 05-020 and are included in Exhibit A to the Complaint.

[15]McLeodUSA's February 22, 2005 request letter is Exhibit B to the Complaint.

[16]"Triennial Review Order" ("TRO") refers to *In the Matter of Review of the Section 251(c) Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC

> FCC view that the ILEC's obligations are governed in the first instance by interconnection agreements ("ICAs") with individual carriers. McLeodUSA believes that the new FCC rules must be implemented through amendments to the interconnection agreement consistent with the change of law provision in our agreement. Indeed, at ¶ 233 of the TRRO the FCC states that it expects ILECs and CLECs to implement the order through the negotiation and arbitration process of Section 252 of the Act.
>
> While the FCC provides a transition mechanism in the TRRO, it also states that "the transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period." Accordingly, McLeodUSA hereby requests commencement of good faith 252 negotiations to implement the new unbundling requirements into our existing ICAs pursuant to our change of law provisions. It is the expectation of McLeodUSA that SBC will continue to honor our contractual provisions for access to affected UNEs until such time as the required amendments to have been made to the ICAs as required by law.

SBC responded to McLeodUSA's February 11, 2005 request for Section 252 negotiations by letter dated March 1, 2005.[17] (McLeodUSA Ex. 2, p. 4) In its March 1, 2005 letter, SBC stated that it had posted AL CLECALL05-017 through 05-020 on its web site reflecting SBC's view of its unbundling obligations based on the TRRO. SBC also stated:

> SBC also rejects your contention that you may continue to purchase network elements that are no longer subject to unbundling after the *TRO Remand Order* is effective on March 11 because "the existing terms of [your] ICA continue in effect until such time as the Parties have executed a written amendment to the ICA." As you know, the *TRO Remand Order*, effective on March 11, 2005, specifically provides that requesting carriers may no longer obtain new Mass Market ULS/UNE-P, DS1/DS3/Dark Fiber Loops, and DS1 and DS3 Transport where there has been a finding of non-impairment and where ILECs thus are not required to provide such elements under the new unbundling rules. The *TRO Remand Order* further establishes transition plans for the embedded base of those items. This should greatly assist your company(ies) in implementing the *TRO Remand Order*. **Please note that, notwithstanding your ICA(s), orders received for elements that have been declassified through a finding of non-impairment by the *TRO Remand Order* will not be accepted, beginning**

Docket 96-98, and *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket 98-147, Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug. 21., 2003).

[17] SBC's March 1, 2005 letter is Exhibit C to the Complaint.

> **March 11, 2005, as clearly outlined in Accessible Letters CLECALL05-017 and CLECALL05-019.** The FCC's rules, effective March 11, 2005, provide that CLECs may not obtain such elements beginning on that date, and do not require contract amendments for effectuation. See §51.319(d)(2), §51.319(a)(6)(ii), and §51.319(e)(2)(iv)(B). (Emphasis in original.)[18]

SBC further stated that it had also posted on its web site signature-ready amendments to the McLeodUSA-SBC ICA in order "to bring your ICA(s) into conformance with the FCC's new unbundling rules." SBC asserted that the language of its ICA amendment "was derived directly from the TRO Remand Order and thus should be executed without delay." SBC stated that it again requested that McLeodUSA execute and return the SBC-proposed amendments "so that we may promptly reach agreement." Additionally, SBC's March 1 letter stated that "If you have additional written language proposals to make relative to the *TRO Remand Order*, separate and apart from the transition plan and pricing, please forward them . . . at your earliest convenience." SBC's letter stated, however, that "negotiation concerning such proposals should not delay timely implementation of the Commission's new unbundling rules and transition plans, which are covered by SBC's online proposed amendments." (See McLeodUSA Ex. 2, p. 4.)

Subsequent to the correspondence described above, there have been other discussions between representatives of McLeodUSA and representatives of SBC on the topic of negotiating an amendment or amendments to the parties' ICA relating to the provisions of the TRRO. Specifically, there have been several conference calls between the parties on this topic. In addition, McLeodUSA's Manager, Interconnection Negotiation and her counterpart at SBC have a regularly scheduled call virtually every Friday to discuss the status of outstanding ICA

[18]The phrase in quotes in the above excerpt from SBC's March 1 letter, "the existing terms of [your] ICA continue in effect until such time as the Parties have executed a written amendment to the ICA", does not appear in McLeodUSA's February 22 letter to SBC. SBC's March 1 letter (Ex. C to the Complaint) also "responded" to other statements and requests that were not included in McLeodUSA's February 11 letter.

amendment negotiation items between McLeodUSA and SBC. These representatives have discussed the status of TRRO-related negotiations several times subsequent to issuance of the TRRO. (McLeodUSA Ex. 2, pp. 5-6)

Additionally, McLeodUSA had presented to SBC a counterproposal to the ICA amendments that were attached to SBC's Accessible Letters CLECALL05-018 and 05-020. Specifically, McLeodUSA has provided a comprehensive proposed amendment to Appendix UNE to the parties' ICA. This proposal was initially filed on March 25, 2005, in the context of a collaborative being conducted under the auspices of the Michigan Public Service Commission relating to implementation of the TRRO. However, this proposed amendment to Appendix UNE is being offered by McLeodUSA as its proposed TRRO-related amendment to the ICAs for all of the SBC states in which McLeodUSA operates, including Illinois.[19] (McLeodUSA Ex. 2, p. 5)

D. McLeodUSA's Attempts to Get SBC Illinois to Correct the Matters Complained Of As Required by Section 13-515 of the PUA

Prior to filing its Complaint, McLeodUSA made a written request to SBC Illinois, as required by Section 13-515(c) of the PUA, enumerating SBC's actions that McLeodUSA believes are violations of Section 13-514 and requesting that SBC correct the situation. Specifically, on March 9, 2005, McLeodUSA transmitted a 48-hour notice letter to SBC.[20] Among other points, McLeodUSA stated in its March 9, 2005 letter:

> As you know, SBC Illinois currently has an Interconnection Agreement ("Agreement") with McLeodUSA. The Agreement requires that in the event of a

[19]On April 11, 2005, McLeodUSA submitted this Appendix UNE amendment to counsel for SBC Illinois in ICC Docket 04-0606, in accordance with the schedule established in that proceeding, as McLeodUSA's proposed TRRO-related ICA amendment for purposes of the collaborative or settlement meetings concerning negotiation of TRO- and TRRO-related amendments to the ICAs between SBC and numerous Illinois CLECs, that the ALJ in that docket has directed take place during April and May.

[20]A copy of McLeodUSA's March 9, 2005 letter is Exhibit E to the Complaint.

> change in law, SBC Illinois and McLeodUSA enter into negotiations to arrive at agreement as to any appropriate conforming modifications to the Agreement. Additionally, paragraph 233 of the Federal Communications Commission's Triennial Review Remand Order ("TRRO") expressly requires that ILECs and CLECs must implement the TRRO through changes to their interconnection agreements pursuant to Section 252 of the Telecommunications Act. In fact, by letter dated February 22, 2005, to SBC, McLeodUSA requested such negotiations with respect to the TRRO, for ten states including Illinois, and requested that SBC identify its negotiator. I am including with this letter McLeodUSA's February 22, 2005 letter to SBC and SBC's response dated March 1, 2005 ("SBC Response"). Representatives of SBC and of McLeodUSA have also had subsequent telephone discussions concerning this matter.
>
> McLeodUSA notes that the SBC Response does not dispute that the TRRO is a change of law requiring negotiation of any applicable modifications to the Agreement, and does not indicate that SBC Illinois is unwilling to engage in negotiation of such modifications. However, what is not clear from the SBC Response, particularly in light of SBC's position as reflected in Accessible Letters CLECALL05-017, 05-018, 05-019 and 05-020, is whether SBC Illinois intends to abide by the terms of the Agreement and to continue to provide to McLeodUSA, and to fill McLeodUSA's orders for, unbundled network elements in accordance with the existing terms of the Agreement after March 11, 2005, in the event that negotiations are not completed and an amendment to the Agreement has not been entered into by that date. For example, CLECALL05-017 and 05-019 state that the effect of the TRRO on New, Migration or Move Local Service Requests ("LSRs") for Unbundled Local Switching ("ULS") and the UNE-P and for affected high-capacity loop and transport UNEs "is operative notwithstanding interconnection agreements". These assertions are contrary to the terms of the Agreement, of Section 252 and of the TRRO itself.

McLeodUSA also advised SBC that based on analysis McLeodUSA had performed using data provided by a third-party data source, McLeodUSA did not agree with the lists that SBC had posted on its website setting forth the wire centers and transport routes in Illinois that SBC contended do not meet the new impairment criteria announced in the TRRO for unbundled DS1 and DS3 loops and interoffice transport. McLeodUSA stated that SBC had listed certain wire centers and routes as not meeting the new impairment criteria which McLeodUSA's analysis, using data from a third-party data source, indicated do meet the TRRO impairment criteria. McLeodUSA also pointed out that as of that date (March 9), SBC Illinois had not made the data

on which SBC based its lists of non-impaired wire centers and transport routes available to CLECs, to enable McLeodUSA to attempt to resolve the discrepancies between the parties' lists.

McLeodUSA pointed out that in addition to SBC's obligations to continue to provide access to the UNEs that are the subject of AL CLECALL05-017 through 05-020 until appropriate amendments to the parties' ICA are negotiated and approved, in accordance with the terms of the McLeodUSA-SBC ICA and the TRRO, SBC Illinois also continued to have independent obligations to provide McLeodUSA with unbundled access to the UNEs that are the subject of AL CLECALL05-017 through 05-020, at either TELRIC or "just and reasonable" rates, pursuant to one or more of the following provisions of law: (i) Section 13-801 of the PUA, (ii) the June 2002 Order of this Commission in Docket 01-0614 implementing Section 13-801, (iii) SBC Illinois' intrastate tariffs on file with the Commission and currently in effect, (iv) SBC Illinois' obligations under Section 271 of the federal Act, and (v) the terms of the FCC's 1999 Order approving the merger of SBC Communications, Inc. and Ameritech Corp.[21] Accordingly, in light of the prospective violations of the parties' ICA and the TRRO (as well as the other independent sources of SBC Illinois' obligations) indicated by SBC AL CLECALL05-017 through 05-020 and SBC's March 1, 2005 letter, McLeodUSA demanded that SBC provide McLeodUSA with adequate written assurances as to the following (among other things):

> SBC Illinois will continue to provide to McLeodUSA, and fill McLeodUSA's orders for, unbundled network elements in accordance with the existing terms of the Interconnection Agreement between SBC Illinois and McLeodUSA after March 11, 2005, in the event that negotiations (and, if necessary, any dispute resolution procedures pursuant to the Agreement) are not completed and an amendment to the Agreement entered into by that date, until such negotiations

[21] *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's* Rules, CC Docket 98-141, FCC 99-279, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) ("SBC-Ameritech Merger Order").

(and any dispute resolution procedures) are completed and an amendment to the Agreement has been entered into.

Additionally, McLeodUSA's letter pointed out specific concerns with respect to whether SBC Illinois would continue after March 11, and during the twelve month transition period specified by the TRRO with respect to "embedded base" CLEC customers served using Mass Market ULS, to provision ULS to serve existing McLeodUSA customers served using ULS/UNE-P who requested, for example, installation of additional lines:

> Further, in addition to its general concern as to whether SBC Illinois will continue to abide by the Agreement while change of law processes are followed in accordance with the Agreement, McLeodUSA is specifically concerned about SBC Illinois' position, as reflected in Accessible Letter CLECALL05-017, that after on and March 11, 2005, SBC Illinois will reject all New, Migration and Move LSRs for Mass Market ULS and the UNE-P, including LSRs for embedded base customers. The FCC's new rule, 47 C.F.R. 51.319(d)(2)(ii), as set forth in the TRRO, provides that for a 12-month period following the effective date of the TRRO, an ILEC must provide access to unbundled local circuit switching for a requesting carrier to serve its embedded base of end-user customers. The "embedded base of end-user customers" refers to the base of customers the CLEC has on the effective date (March 11). Therefore, even if the TRRO were "self-effectuating" without amendments of interconnection agreements (which it is not), a refusal by SBC Illinois to accept New, Migration or Move LSRs for ULS or UNE-P for embedded base ULS/UNE-P customers after March 11, 2005 would violate the TRRO.

Accordingly, with respect to this point, McLeodUSA demanded that SBC Illinois provide McLeodUSA with adequate, written assurances that:

> In any event, on and after March 11, 2005, SBC Illinois will accept, and promptly process, all New, Migration and Move LSRs for Mass Market Unbundled Local Switching and the UNE-P for service to McLeodUSA's embedded base of customers served using ULS and/or UNE-P as of March 11, 2005.

SBC Illinois responded to McLeodUSA's March 9, 2005 letter on March 11, 2005.[22] SBC's March 11 letter evidenced a continuing intention to unilaterally implement the revised

[22]SBC Illinois' March 11, 2005 letter is Exhibit F to the Complaint.

unbundling rules announced in the TRRO even though amendments to the McLeodUSA-SBC ICA had not been negotiated and approved, commencing March 11, 2005:

> Your [McLeodUSA's] letter objects to the Accessible Letters on the grounds that they constitute an unlawful bypass of the change in law provisions of the parties' interconnection agreement and are consistent [sic; inconsistent] with legal duties imposed by SBC Illinois under federal and state law. Your letter contends that SBC Illinois may not implement the TRRO issued by the FCC without contract modifications. SBC Illinois does not agree. As you know, the TRRO becomes effective on March 11, 2005, earlier than it otherwise would have because of market disruption and public interest considerations that the FCC found were "applicable here, and counsel *implementation*, by March 11, 2005, of the rules adopted herein." TRRO, ¶ 236. (emphasis added [in SBC letter]). The Transition Plans outlined in the TRRO clearly state that the "transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new "unbundled dedicated transport, high capacity loops or mass market local switching where the Commission has determined that no section 251(c) unbundling requirement exists. TRRO, ¶5.

Accordingly, SBC asserted that:

> The FCC has the authority to implement changes to unbundling requirements relative to items that are no longer deemed lawful pursuant to Section 251(c). To that end, and subject to the final paragraph of this letter, **SBC Illinois fully intends to comply with the TRRO and stop accepting new order for mass market Unbundled Local Circuit Switching/UNE-P, Unbundled High-Capacity Loops and Unbundled Dedicated Transport pursuant to the impairment conclusions reached by the FCC.** SBC Illinois will also begin billing the rate modifications and begin the transition periods set forth in the TRRO on March 11, 2005. While the FCC recognizes the need to modify existing ICAs to incorporate its conclusions, it does not require contract modifications prior to implementation of 1) the requirement of new orders for the specified elements and 2) the billing of the rate modifications for the embedded base of the specified elements. In other words, **the requirement to amend interconnection agreements does not in any way delay the effectiveness of the FCC's clear direction that CLECs are not to submit, and ILECs are not to process, orders for new UNEs beginning March 11, 2005. (**emphasis added)

Finally, SBC's March 11 letter made reference to SBC's obligations under the PUA to continue to provide UNEs affected by the TRRO, and stated that SBC would continue to accept and provision orders for certain of those UNEs – specifically, ULS and UNE-P -- unless and until SBC was successful, in a pending federal court lawsuit, in obtaining an injunction against

enforcement of the provisions of Section 13-801 of the PUA, the Commission's June 11, 2002 Order in Docket 01-0614 interpreting Section 13-801, and SBC's implementing tariffs, "insofar as they would require SBC Illinois to provide unbundled access to local switching, related elements and UNE-P after March 11, 2005." SBC asserted that the provisions of Section 13-801, the Commission's June 11, 2002 Order in Docket 01-0614, and SBC's tariffs, were inconsistent with and preempted by the federal Act and the TRRO.

E. The Harm That McLeodUSA and the Public Will Suffer If SBC Is Allowed to Unilaterally Implement the Revised Unbundling Rules Announced in the TRRO Without Negotiating Interconnection Agreement Amendments

Presently, as a result of the "Order Granting Emergency Relief" issued by the Administrative Law Judge on March 16, 2005 and the Amendatory Order issued by the Commission on March 23, 2005, in this docket, as well as SBC's commitment to continue to accept and provision orders for ULS/UNE-P pursuant to its obligations under Section 13-801 and its own implementing tariffs, McLeodUSA continues to be able to order and obtain from SBC Illinois UNE-P, unbundled DS1 and DS3 loops and unbundled DS1 and DS3 dedicated interoffice transport notwithstanding SBC's Accessible Letters. However, if SBC were to be allowed to commence rejecting orders for these UNEs, before appropriate amendments to the McLeod-SBC ICA are negotiated and approved, McLeodUSA, the competitive telecommunications markets in Illinois and the public interest would all be harmed.

1. ULS/UNE-P and DS1 and DS3 Loops to Serve New Customers and New DS1 and DS3 Interoffice Transport UNEs

As summarized in Section III.A above, McLeodUSA's use of ULS/UNE-P purchased from SBC to serve retail customers in competition with SBC is concentrated in areas outside of the Chicago metropolitan area. Thus, a cessation of McLeodUSA's ability to order ULS/UNE-P to serve new customers in these areas, before alternative contractual arrangements have been

negotiated, would have a serious adverse impact on McLeodUSA's ability to continue to offer a competitive alternative to retail consumers in these areas, and would reduce the availability to consumers of a major competitive alternative to taking service from the incumbent carrier, SBC. Additionally, McLeodUSA provides service to customers using unbundled DS1 and DS3 loops and interoffice transport purchased from SBC in wire centers for which (according to SBC) these UNEs will no longer be available based on the new impairment criteria announced in the TRRO. McLeodUSA presently leases approximately 107 unbundled DS1 and DS3 loops from SBC in those wire centers. (McLeodUSA Ex. 1, p. 5) Further, SBC's list of the transport routes in Illinois that will no longer meet the impairment criteria for unbundled DS1 and DS3 transport includes 32 routes on which McLeodUSA is currently leasing unbundled transport from SBC. (*Id*., p. 6)[23]

In those exchanges where McLeodUSA uses UNE-P to serve retail customers, McLeodUSA's alternatives once UNE-P is no longer available are essentially limited to purchasing resale service from SBC to provision POTS lines, and purchasing special access from SBC to provision T-1 lines. (McLeodUSA Ex. 1, p. 6)[24] SBC has also offered CLECs a "commercial" replacement for UNE-P, but this offering is not economically or commercially viable for McLeodUSA and would not enable McLeodUSA to remain as a competitive provider in the markets where it currently utilizes SBC UNE-P. (*Id*.) Although resale is encompassed in

[23]During the most recently-completed quarter, ended December 31, 2004, McLeodUSA ordered 1,304 UNE-P lines, 1,121 circuits on unbundled DS1 and DS3 loops, and 215 circuits on DS1 and DS3 transport UNEs, from SBC in Illinois. (McLeodUSA Ex. 1, p. 5) Thus, McLeodUSA continues to make use of these UNEs to provide service to new retail customers in Illinois.

[24]McLeodUSA uses its own switches, located in Chicago, Springfield, St. Louis and Madison, Wisconsin, to serve 85% of its access lines in Illinois. Thus, the SBC exchanges where McLeodUSA presently uses UNE-P, and must negotiate alternative arrangements, are those for which installing or accessing McLeodUSA's own switches is uneconomic, infeasible or impractical.

McLeodUSA's existing ICA with SBC, resale as currently offered by SBC is not a competitively viable alternative.[25] (*Id*.) Thus, it will be necessary for McLeodUSA to negotiate new provisions with SBC with respect to resale and special access, including possibly amendments to the resale provisions of the ICA, in order for McLeodUSA to be able to continue to provide service to new customers (as well as existing customers) in the exchanges in which it currently provides service using UNE-P. McLeodUSA expects those negotiations to be difficult and complex. (*Id*., pp. 6-7) If SBC Illinois were allowed to cease providing ULS/UNE-P to serve new customers in these exchanges before the necessary agreements and amendments are negotiated, McLeodUSA would be left with no alternatives that would allow it to continue to offer services to new customers as an alternative to SBC in these exchanges.[26]

In those wire centers that do not meet the TRRO's new impairment criteria for unbundled DS1 and DS3 loops, it will be necessary for McLeodUSA to instead use special access from SBC, which is considerably more costly, in order to add new customers that need to be served with high-capacity loops.[27] (McLeodUSA Ex. 1, p. 7) SBC has also proposed some alternative products that McLeodUSA may be able to use and that potentially could be more cost effective than special access. However, the prices, terms and conditions initially proposed by SBC would not enable McLeodUSA to be competitive. Thus, significant negotiations with SBC will be necessary to arrive at prices, terms and conditions that are competitively and financially acceptable to McLeodUSA and will enable it to continue to offer and provide service in the

[25]McLeodUSA Exhibit 8 is Appendix Resale to the McLeodUSA-SBC Illinois ICA.

[26]In addition, McLeodUSA could be required to terminate existing customers served using UNE-P as their contracts with McLeodUSA expire, due to lack of an alternative means to provision service to these customers. (McLeodUSA Ex. 1, p. 8)

[27]As noted earlier, DS1 loops are used to serve retail business telecommunications customers that require as few as six lines.

affected wire centers.[28] (*Id.*) If SBC Illinois were allowed to unilaterally terminate the provision of unbundled DS1 and DS3 loops in non-impaired wire centers before these agreements and amendments are negotiated and in place, McLeodUSA would be unable to offer service in these wire centers to new customers for which high capacity loops are needed.[29]

Finally, with respect to unbundled DS1 and DS3 dedicated interoffice transport, McLeodUSA would need to switch to special access arrangements or an alternative product from SBC.[30] (McLeodUSA Ex. 1, p. 7) However, as with arranging for alternatives for unbundled DS1 and DS3 loops, significant negotiations will be necessary to arrive at prices, terms and conditions for the alternatives that will be competitively and financially acceptable.[31] (*Id.*, pp. 7-8) If SBC Illinois were allowed to unilaterally terminate the provision of unbundled DS1 and

[28]As noted earlier, McLeodUSA does not agree with SBC's posted lists of wire centers that SBC believes meet the new non-impairment criteria for unbundled DS1 and DS3 loops announced in the TRRO. (SBC's lists are in the record as Attachments 1 and 2 to McLeodUSA Ex. 9) McLeodUSA believes that SBC's list includes wire centers that do not meet the non-impairment criteria. (See McLeodUSA Ex. 1, pp. 5-6; Ex. E to Complaint, p. 2) Presumably these differences will ultimately be resolved, through negotiation or other processes. However, McLeodUSA believes it is important for the amendment to the parties' ICA that incorporates the provisions of the TRRO include an agreed list of the non-impaired (or impaired) wire centers for unbundled high capacity loops, so that the ICA is clear as to where McLeodUSA is entitled to obtain unbundled high capacity loops.

[29]Additionally, as noted for ULS/UNE-P, McLeodUSA could be required to terminate service to existing customers that McLeodUSA serves using unbundled high capacity loops in these wire centers as the customers' existing contracts with McLeodUSA expire. (McLeodUSA Ex. 1, p. 8)

[30]McLeodUSA has an extensive network of its own fiber optic transport facilities in place in Illinois. (McLeodUSA Ex. 1, p. 4) Nonetheless, McLeodUSA also makes use of unbundled transport purchased from SBC in those areas or on those transport routes where installation of McLeodUSA's own fiber optic facilities is uneconomic, infeasible or impractical. (*Id.*, p. 5)

[31]An additional alternative with respect to these routes would be to utilize other providers of fiber optic capacity that may exist on these routes. In order to use this option, it would be necessary for McLeodUSA to identify such alternate providers as may have facilities in place for each route, determine if these providers' offerings meet McLeodUSA's needs, and negotiate specific contractual terms with one or more alternative providers. (McLeodUSA Ex. 1, p. 8)

DS3 dedicated interoffice transport between non-impaired wire centers before these agreements and amendments are negotiated and in place, McLeodUSA would experience difficulty in adding customers in these wire centers or in maintaining the quality of service it provides to customers located in these wire centers. (McLeodUSA Ex. 1, p. 9)

As indicated by the foregoing discussion, there would be a number of adverse consequences to McLeodUSA and its current and potential retail telecommunications customers in Illinois if SBC were unilaterally to cease to provide UNE-P to McLeodUSA and unilaterally cease to provide unbundled DS1 and DS3 loops and transport facilities for the non-impaired wire centers, before amendments and agreements for alternative arrangements have been negotiated and put in place.

First, McLeodUSA would be limited in its ability to market to and accept business from new customers, in particular (i) mass market customers in areas that it is uneconomic, infeasible or impractical for McLeodUSA to serve with its own switching facilities, and (ii) larger, multi-line business customers located in wire centers where McLeodUSA is no longer able to obtain unbundled high capacity loops from SBC. (McLeodUSA Ex. 1, p. 8) Absent successful negotiation of satisfactory alternatives (which could include amendments to the resale or other provisions of McLeodUSA's ICA), McLeodUSA would no longer be competitive in these areas and therefore would cease marketing and offering service to new customers and would decline to renew contracts for existing customers whose contracts expire. (*Id.*, pp. 8, 10) Correspondingly, customers in these areas would have one less alternative to service from SBC. This could be a particularly significant adverse impact in many markets in SBC Access Area C where there are already fewer competitors than in the Chicago metropolitan area. (*Id.*, pp. 8-10) In short, McLeodUSA could find it necessary to turn away customers seeking a competitive alternative to

SBC. This situation would be harmful to McLeodUSA's relationships with current and prospective customers and to its good will and reputation with customers as a full-service alternative to SBC. (*Id*., p. 10)

Second, in those market areas in which it uses UNE-P to serve customers, McLeodUSA would experience reduced sales and revenues and may be unable to achieve growth in access lines and revenues. (McLeodUSA Ex. 1, p. 9) The same is true in those areas in which McLeodUSA provides service using its own switching along with DS1 and DS3 loops leased from SBC that McLeodUSA would no longer be able to obtain. As a result, McLeodUSA would face a scenario of reduced or no growth in customers, lower revenues and reduced utilization of its facilities. The inability to continue its growth in access lines would be detrimental to McLeodUSA because its existing switching facilities are not yet fully utilized. Increasing the number of lines it serves enables McLeodUSA to better utilize its existing facilities, achieve greater financial stability and be a better competitor. (*Id*., p. 9)

Finally, absent negotiation of additional alternatives, the cost to McLeodUSA of maintaining adequate facilities or upgrading facilities (such as transport) will increase and incremental facilities obtained from SBC will cost more. (McLeodUSA Ex. 1., p. 9)

SBC's testimony of Carol Chapman (SBC Ex. 1), filed in response to the direct testimony of McLeodUSA's witnesses and those of the other complainants, contended that CLECs have alternatives to ULS/UNE-P and unbundled high capacity loops and interoffice transport, if SBC is allowed to unilaterally cease providing these UNEs. Alternatives identified by Ms. Chapman include resale, "commercial arrangements" offered by SBC, special access and third-party-provided transport, as well as deploying the CLECs' own facilities (obviously, a potential alternative with much longer lead time than the other potential alternatives). (SBC Ex., 1, pp.

29-35) As the discussion above shows, these possible alternatives were identified by McLeodUSA's witness Mr. Herron as well. However, the mere existence of these alternatives does not address the need to negotiate and put into place ICA amendments encompassing those alternatives or agreements with alternative providers, if applicable. SBC witness Ms. Chapman did not dispute the following points that were made by McLeodUSA's witness Mr. Herron:

- SBC resale as presently offered is not a competitively viable alternative for providing POTS to retail customers. (McLeodUSA Ex. 1, p. 6)
- SBC's "commercial offering" to replace UNE-P, as initially proffered, is not competitively or economically viable. (McLeodUSA Ex. 1, p. 6)
- SBC special access, as presently available, is significantly more costly than unbundled high capacity loops. (McLeodUSA Ex. 1, p. 7)
- SBC's alternative product offered for unbundled high capacity loops, as initially presented, is not competitively viable. (McLeodUSA Ex. 1, p. 7)
- The alternatives current available to McLeodUSA to replace SBC ULS/UNE-P and unbundled DS1 and DS3 loops, without further negotiation and modification, are cost prohibitive and would not allow McLeodUSA to be competitive with SBC, with the result that McLeodUSA would have to cease accepting customers in areas where it has used ULS/UNE-P and unbundled high capacity loops to provide service. (McLeodUSA Ex. 1, pp. 8, 10)

Similarly, SBC witness Chapman did not dispute McLeodUSA's testimony that negotiations to arrive at ICA amendments or other agreements in order to accommodate any of these alternatives will be difficult and complex. (McLeodUSA Ex. 1, pp. 6-8) Nor (as discussed in greater detail later in this brief) did she dispute any of the points noted by McLeodUSA's witness Julia Redman Carter, McLeodUSA's Manager, Interconnection Negotiation, relating to the concerns about the ICA amendments offered by SBC with AL CLECALL05-018 and 05-020 and the likelihood that lengthy negotiations will be needed in order to reach agreement on these amendments. (McLeodUSA Ex. 2, pp. 6-10)

2. ULS/UNE-P Orders to Serve "Embedded Base" Customers

The discussion in Section III.E.1 above describes the harm to McLeodUSA, the competitive telecommunications markets in Illinois and the public if SBC were allowed unilaterally to begin rejecting McLeodUSA's orders for ULS/UNE-P to serve new retail customers and were allowed to begin rejecting McLeodUSA's orders for unbundled DS1 and DS3 loops and interoffice transport for wire centers that do not meet the new impairment criteria announced in the TRRO, before necessary amendments are negotiated and in place. There are additional concerns if SBC were allowed unilaterally to begin rejecting McLeodUSA's orders for ULS/UNE-P to provide service to existing CLEC customers who are served using ULS/UNE-P. Based on the SBC Accessible Letters and other SBC documents as described in Sections III.B and III.C above, McLeodUSA understands that it is SBC's position that after March 11, 2005, SBC (unless otherwise constrained) will not fill UNE-P orders to provide additional or changed service to existing CLEC customers (as of March 11) who are served using UNE-P. For example, under SBC's pronouncements, if an existing residential or business customers served by McLeodUSA via UNE-P were to move to a new home or office or business facility, and wished to continue being served by McLeodUSA, SBC would not accept an order for UNE-P to serve this McLeodUSA customer at the new location, even if the customer's new location was within the same serving wire center.

Similarly, if an existing McLeodUSA residence customer served using UNE-P wanted to add a second or third line, or if an existing McLeodUSA business customer served using UNE-P wanted to add additional lines at the customer's office, store or plant, SBC would not accept an order for additional UNE-P arrangements to provision the customer's additional requested

lines.[32] (McLeodUSA Ex. 1, pp. 10-11) In these scenarios, McLeodUSA would have to provision the customer's requested additional lines using a service format or platform other than UNE-P, or reject its current customer's request for additional services.

There are several problematic, and harmful, implications if SBC were allowed to implement its position. Serving a customer using both UNE-P and another service format would present difficulties for McLeodUSA in providing adequate service. For example, if a business customer with four UNE-P lines that has a "hunt group" feature requests an additional line and it has to be provisioned other than with UNE-P, the "hunt group" feature will not work with the customer's new, fifth line. (McLeodUSA Ex. 1, p. 11) More generally, in these situations McLeodUSA would have to come up with a potentially costly workaround in order to provide the services requested by the customer. (*Id*.) McLeodUSA would be force to provide service in a manner other than the way in which the system was designed to provide service. Thus, the quality of service McLeodUSA provides could be degraded. (*Id*.) Additionally, it would be necessary for McLeodUSA to use more costly, complex and time consuming processes for placing orders and addressing maintenance issues for these customers. (*Id*.)

Such scenarios would have a negative impact on McLeodUSA's relationship with its existing customers served via UNE-P, and could lead to customers switching to another provider because the customers cannot obtain the service desired from McLeodUSA, or the quality of

[32]It is McLeodUSA's position, in contrast, that the TRRO requires an ILEC to continue to fill CLEC orders for ULS/UNE-P to serve the requirements of customers that the CLEC served using ULS/UNE-P as of March 11, 2005, for the duration of the transition period specified in the TRRO (or until the CLEC migrates those customers to an alternative service). In other words, the "embedded base" of UNE-P customers refers to the *customers* that the CLEC is serving with ULS/UNE-P on March 11, 2005, not the ULS/UNE-P *lines* that the CLEC is serving as of that date. (Complaint, ¶16b; Ex. E to Complaint, p. 3)

service the customers receive is degraded.[33] From the customers' perspective, in these situations the customers would be experiencing a degradation in service and possible delays in obtaining the additional or changed service the customer desires. (McLeodUSA Ex. 1, pp. 11-12)

SBC witness Chapman suggested that a CLEC could move embedded base ULS/UNE-P customers to SBC resale on a transitional basis, prior to moving these customers to another service alternative on a long-term basis, and that this would avoid the problems described above arising from attempting to serve an existing customer using both UNE-P and a second service arrangement or platform. (SBC Ex. 1, pp. 30-31) However, Ms. Chapman did not address the cost of these options, specifically the non-recurring charges ("NRC") simply to migrate existing customers from UNE-P to other service options. Those NRCs can be high indeed. For example, to migrate a CLEC UNE-P line to SBC resale, the CLEC would pay SBC the NRCs specified in the CLEC's ICA or in SBC Illinois' tariff. (McLeodUSA Ex. 9, item 4) Under the Appendix Resale to the McLeodUSA-SBC ICA, McLeodUSA typically would have to pay a Service Ordering Charge and a Line Connection Charge NRC when establishing a resale line. (See McLeodUSA Ex. 8, p. 8.) The Pricing Schedule for UNEs of the McLeodUSA-SBC ICA specifies Service Order/Service Request Charges for Resale of $14.42 for residence lines and $18.85 for business lines. (McLeodUSA Ex. 7, p. 10) SBC's Line Connection Charge currently is $50.13 for UNE-L lines and $26.81 for UNE-P lines[34]

[33]Given that McLeodUSA primarily uses UNE-P to provide service to customers in downstate areas where McLeodUSA may be the principal or perhaps the only competitive alternative to SBC, the "other provider" to which the customer may switch may well be SBC.

[34]Ill. C. C. No. 20, Part 19, Section 2, 7th Revised Sheet No. 33 and Ill. C.C. No. 20, Part 19, Section 15, 2nd Revised Sheet No. 11.1, included in Joint Complainants Ex. 7. These are the Line Connection Charges that SBC tariffed in June 2004 following issuance of the Order in Docket 02-0864. McLeodUSA has not yet entered into an amendment to its ICA with SBC to incorporate the rates that SBC tariffed following issuance of the Order in Docket 02-0864.

To migrate a CLEC UNE-P line to the CLEC's own switching with an SBC unbundled loop, the CLEC would pay aggregate NRCs ranging from $33.40 per line to $95.56 per line, depending on which SBC migration process (Frame Due Time, Coordinated Hot Cut or Batch Hot Cut) could be used. (McLeodUSA Ex. 9, item 5). To migrate a CLEC UNE-P line to a third-party provider's switching, the CLEC would pay migration charges ranging from $33.40 per line to $79.70 per line, depending on which SBC migration process could be used. (*Id.*, item 6 and Attachment 5)

Since McLeodUSA serves approximately 15% of its 116,000 customer lines in Illinois using UNE-P (McLeodUSA Ex. 1, pp. 3-4), the NRCs just to migrate the existing UNE-P lines to an alternative platform will be substantial (even before considering the likely higher recurring costs of the alternatives). During the transition period for the "embedded base" ULS/UNE-P customers, McLeodUSA would hope to negotiate a more cost effective means of migrating existing UNE-P lines to alternative service platforms. Obviously, McLeodUSA does not want to incur two sets of migration NRCs – once to migrate UNE-P lines to another service platform on a "transitional" basis, as suggested by SBC witness Chapman, and a second time to migrate these lines to the "permanent" service platform alternative.

IV. ARGUMENT

A. SBC Cannot Unilaterally Implement the Revised Unbundling Rules Announced in the TRRO Before Amendments to its Interconnection Agreements Are Negotiated and Approved

The headline (but certainly not the only) issue in these complaint cases is whether SBC can unilaterally implement the revised unbundling rules announced in the TRRO and unilaterally decide to cease to accept new orders for certain UNEs that SBC is obligated to provide under the

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Disputes between McLeodUSA and SBC relating to this matter are currently being litigated in Docket 05-0171.

terms of its ICAs, before amendments to the ICAs are negotiated to incorporate and accommodate the new impairment criteria.[35] The provisions of the ICAs, of Sections 251 and 252 of the federal Act, and of the TRRO, dictate that the answer to this question is "no."

1. The McLeodUSA-SBC ICA Specifies a Process for Amendment to Reflect Changes Required by Applicable Regulatory Actions, Consistent with the Federal Act

There has been much discussion in the preliminary rounds of these cases about whether the FCC intended the new impairment rules to be "self-effectuating" on the effective date of the new rules announced in the TRRO (March 11, 2005). The first point to consider in this regard is that the ICAs are contracts between SBC and each CLEC. In the words of Section 252(a)(1), they are "binding agreements." They establish, as a matter of contract, as of their effective dates, the terms and conditions under which the networks of SBC and the CLEC will be interconnected, SBC will provide and the CLEC will obtain access to UNEs, SBC will provide and the CLEC will obtain collocation of its equipment in SBC central offices, and all of the myriad other business relationships between the parties inherent in interconnection. The ICAs are not PUA Article IX tariffs which, although recognized at law to have the force of contract, generally can be modified at any time by order of the regulatory authority with jurisdiction notwithstanding the desires of the utility/carrier and the customer. Rather, the rights and obligations embodied in the ICAs can only be amended according to their terms.

Furthermore, the ICAs have great commercial significance to the parties, especially the CLEC since it is almost always the purchaser of elements necessary to its operations from the ILEC. From the CLEC's point of view, many provisions of the ICA will be critical to the its

[35] As shown in subsequent sections of this brief, even if the answer to this question were "yes" (which it is not), SBC Illinois would have obligations arising from other sources to continue to provide the UNEs in question.

business plan, mode of operation, and ability to offer telecommunications services to new customers and provide services to existing customers. Certainly, this is the case with respect to the provisions of the ICA that specify what UNEs SBC is obligated to provide and the CLEC is entitled to obtain access to, and the rates, terms and conditions on which UNEs will be provided. In the event of a development that entitles one of the parties to request an amendment to the ICA, in accordance with its terms, the content of that amendment may be critical to the other party's continuing operations. A construction of the ICAs under which they could be amended *de facto* by unilateral action of one of the parties would be an unreasonable construction given their nature and purpose. This is particularly the case where it would enable the ILEC unilaterally and on short notice to cease to provide elements on which the CLEC has depended to provide service to its customers.

Interconnection agreements between ILECs and CLECs are established as a result of Section 251 and 252 of the federal Act. Pursuant to these sections, the process by which ICAs are entered into is a request for negotiation by one carrier to another, followed by a period of good faith negotiations between the parties, and if negotiations do not result in complete agreement, a request by one or both parties for arbitration of the remaining issues before the state commission. The final ICA, whether established entirely through negotiation or through a combination of negotiation and arbitration, is submitted to the state commission to be approved unless the state commission finds the ICA meets one of the "grounds of rejection" in Section 252(e)(2). (See Sections 251(c) and 252(a), (b), (c) and (e) of the federal Act). This same process of request for negotiation, negotiation, and dispute resolution (if necessary), concluding with state commission approval, is typically specified in ICAs for amendment to their terms.

The ICA between McLeodUSA and SBC contains specific procedures by which a party can request negotiation of an amendment in the event of a change in statutory law or an administrative or judicial decision that the requesting party believes necessitates a change to the terms of the ICA. Section 21.1, "Intervening Law", of Appendix GT&C (McLeodUSA Ex. 3) of the ICA, as approved by the Commission in Docket 02-0230, states:

> This Agreement is entered into as a result of both private negotiations between the Parties and the incorporation of some of the results of arbitration by the Commissions. In the event that any of the rates, terms or conditions herein, or any of the laws or regulations that were the basis or rationale for such rates, terms and/or conditions in the Agreement, are invalidated, modified or stayed by any action of any state or federal regulatory or legislative bodies or courts of competent jurisdiction, including but not limited to [certain FCC and court cases predating the effective date of the ICA are listed here], the affected provision shall be immediately invalidated, modified, or stayed, consistent with the action of the legislative body, court or regulatory agency upon the written request of either Party. In such event, the Parties shall expend diligent efforts to arrive at an agreement regarding the appropriate modifications to the Agreement. If negotiations fail, disputes between the Parties concerning the interpretation of the actions required or provisions affected by such governmental actions shall be resolved pursuant to the dispute resolution process provided for in this Agreement.[36]

Appendix UNE of the ICA (McLeodUSA Ex. 5) contains essentially the same text in Section 20.1, which states in pertinent part:

> [B]oth Parties reserve the right to dispute whether any UNEs identified in the Agreement must be provided under Section 251(c) and Section 251(d) of the Act, and under this Agreement . . . In the event that the FCC, a state regulatory agency or a court of competent jurisdiction, in any proceeding, based upon any action by any telecommunications carrier, finds, rules and/or otherwise orders ("order") that any of the UNEs and/or UNE combinations provided for under this Agreement do not meet the necessary and impair standards set forth in Section 251(d)(2) of the Act, the affected provision will be invalidated, modified or stayed as required to immediately effectuate the subject order upon written request of either party. In such event, the Parties shall expend diligent efforts to arrive at an agreement on the modifications required to the Agreement to immediately effectuate such order.

[36]The remainder of §21.1 essentially states that by entering into the ICA, neither party waives its rights with respect to certain listed court cases or the remands of those cases, including the right to seek legal review or stays pending appeals of those decisions.

> If negotiations fail, disputes between the Parties concerning the interpretations of the actions required or the provisions affected by such order shall be handled under the Dispute Resolution Procedures set forth in this Agreement.[37]

Additionally, the Fourth Amendment to the ICA, entitled "Amendment Superseding Certain Intervening Law, Compensation, Interconnection and Trunking Provisions", which was approved by the Commission in Docket 04-0589, makes a slight modification to the procedures for negotiating amendments to reflect a change of law, in Section 2.1 of that Amendment[38]:

> Except as otherwise set for in Sections 2.2 and 2.3 below[39], if any reconsideration, agency order, appeal, court order or opinion, stay, injunction or other action by any state or federal regulatory or legislative body or court of competent jurisdiction stays, modifies, or otherwise affects any of the rates, terms and/or conditions ("Provisions") in this amendment or the current ICAs or any future interconnection agreement(s), specifically including, but not limited to, those arising with respect to [certain listed court decisions], the affected Provision(s) will be immediately invalidated, modified or stayed as required to effectuate the subject order, but only after the subject order becomes effective, upon the written request of either Party ("Written Notice"). In such event, the Parties shall have sixty (60) days from the Written Notice to attempt to negotiate and arrive at an agreement for the appropriate conforming modifications. If the Parties are unable to agree upon the required conforming modifications within sixty (60) days from the Written Notice, any disputes between the parties concerning the interpretation of the actions required or the provisions affected by

[37]Appendix UNE also provides, in §21.1, "Applicability of Other Rates, Terms and Conditions", that "Every interconnection, service and network element provided hereunder, shall be subject to the applicable rates, terms and conditions contained in this Agreement", and that "The parties recognize that provisions in the General Terms and Conditions apply to services, interconnections and network elements provided under the individual appendices or attachments to this Agreement."

[38]The preamble of the Fourth Amendment states, "This Amendment Superceding Certain Intervening Law, Reciprocal Compensation, Interconnection and Trunking Terms ("Amendment") is applicable to this and any future Interconnection Agreement(s) between SBC Telecommunications, Inc. on behalf of and as agent for Illinois Bell Telephone Company . . . and McLeodUSA . . . ." Section 1.3 of the Fourth Amendment states that "The Parties agree that this Amendment will act to supersede, amend and modify the applicable provisions currently contained in the ICAs."

[39]Sections 2.2 and 2.3 of the Fourth Amendment relate generally to reciprocal compensation and other compensation between the Parties for terminating each other's local traffic, and do not relate to the provision of UNEs under the ICA.

> such order shall be resolved pursuant to the dispute resolution process provided for in the current ICAs or any future interconnection agreement(s). (Section 2.1 to Fourth Amendment (included in Ex. D to Complaint))[40]

The dispute resolution provisions of the ICA, referred to in Section 21.1 of Appendix GT&C and in Section 2.1 of the Fourth Amendment, are set forth in Section 10 of Appendix GT&C. While the provisions of Section 10 are too lengthy to be set forth here in full text, they give either party the right to invoke informal dispute resolution processes set forth in the ICA, and, following the conclusion of the informal dispute resolution procedures, to invoke the informal or formal complaint procedures of this Commission "for any dispute arising out of this agreement or its breach which involves, in whole or in part, the application or interpretation of state or federal telecommunications laws and regulations."[41] Section 10.3, "Commencing Dispute Resolution", provides that "Dispute Resolution shall commence upon one Party's receipt of written notice of a controversy or Claim arising out of relating to this Agreement or its breach. No Party may pursue any Claim unless such written notice has first been given to the other Party."[42] Section 10.5, "Informal Resolution of Disputes", states:

> 10.5.1 Upon receipt by one Party of notice of a dispute by the other Party pursuant to Section 10.3 . . . each Party will appoint a knowledgeable, responsible representative that will have authority to finally resolve the dispute to meet and negotiate in good faith to resolve any dispute arising under this Agreement.

[40]Section 2.1 also states that "In the event that any intervening law rights in the current ICAs . . . conflict with this Intervening Law paragraph and Section 2.2 and 2.3, for the time period from June 1, 2004 up through and including December 31, 2004, this Intervening Law paragraph and Sections 2.2 and 2.3 following shall supersede and control as to any such conflicts as to all rates, terms and conditions in the current ICAs . . . with respect to the intervening law, reciprocal compensation, interconnection and trunking terms set forth herein."

[41]See Sections 10.2.1 and 10.5 of Appendix GT&C, pp. 56 and 58-59 of McLeodUSA Ex. 3.

[42]See McLeodUSA Ex. 3 at pp. 58-59.

> Designation of representatives must be provided in writing to the other Party within five (5) calendar days of receipt of notice of a dispute. . . [43]
>
> 10.5.2 The informal Dispute Resolution process shall conclude not more than fifteen (15) business days after the service of a party's written notice of controversy or claim provided pursuant to Section 10.3.1 unless the Parties mutually agree to extend this deadline for concluding the informal Dispute Resolution Process. Upon conclusion of the informal Dispute Resolution process, either Party may in its sole discretion invoke either the formal Dispute Resolution set forth in Section 10.6 or the informal or formal complaint procedures of the appropriate state or federal regulatory agency.

Finally, Section 23.1 of Appendix GT&C of the ICA states that "The Parties understand and agree that this Agreement and any amendment or modification hereto will be filed with the Commission for approval in accordance with Section 252 of the Act" (McLeodUSA Ex. 3, p. 81), and Section 44.1 of Appendix GT&C specifies that:

> No provision of this Agreement shall be deemed amended or modified by either Party unless such an amendment or modification is in writing, dated, and signed by an authorized representative of both Parties. The rates, terms and conditions contained in the amendment shall become effective upon approval of such amendment by the appropriate Commissions. (*Id*., p. 95)

The foregoing contractual provisions set forth a procedure for amending the ICA that is structured and rigorous. At the outset, the process must be initiated by a written request from one of the parties stating that there has been a legislative, regulatory or judicial action that has changed a law or regulations that were the basis for any of the prices, terms and conditions in the ICA, and requesting that the purportedly affected provisions of the ICA be invalidated, modified or stayed and that the parties "expend diligent efforts" to arrive at an agreement regarding the appropriate conforming modifications to the ICA.

Once such a written request such is made, the parties must engage in negotiations "to arrive at an agreement regarding the appropriate conforming modifications to the Agreement" to

[43]The remainder of subsection 10.5.1 details procedures to be used by the designated representatives for conducting negotiations, including provisions for exchanges of information.

modify or replace the provision or provisions that are being modified as the result of the legislative, regulatory or judicial decision. Of course, these negotiations may not go smoothly. The parties may disagree on many issues, including (i) whether law or regulation that has been invalidated, modified or stayed by legislative, regulatory or judicial action was in fact "the basis or rationale for" any of the rates, terms and/or conditions in the ICA, and if so, exactly which rates, terms and/or conditions; (ii) what existing provisions of the ICA need to be modified; and (iii) what the nature and language of the "conforming modifications" should be. The ICA therefore also provides the opportunity for a party to invoke informal dispute resolution processes if negotiations fail to produce agreement on appropriate modifications to the ICA; and then to invoke formal dispute resolution processes (including the formal complaint process before this Commission) if the informal dispute resolution procedure does not produce agreement on the appropriate modifications to the ICA within a specified time period. In this case, in fact, McLeodUSA and SBC clearly are not in agreement as to the appropriate "conforming modifications' to the ICA that should be implemented in light of the TRRO. Finally, the amendment that has been arrived at must be filed with and approved by the Commission in order to be effective.

The process set out in the McLeodUSA-SBC ICA for amending the ICA to reflect a legislative, regulatory or judicial action – request, negotiation, and informal and formal dispute resolution (if needed) – parallels and is fully consistent with the process for interconnection agreements prescribed by Sections 251 and 252. There is nothing in either the McLeodUSA-SBC ICA, nor in Sections 251 and 252, that would authorize one party to unilaterally deviate from the provisions of the ICA, on the basis of a legislative, regulatory or judicial action or other

basis, without first reaching agreement (whether through negotiation or through dispute resolution processes) with the other party as to the appropriate modifications to the ICA.

2. The TRRO Supports the CLECs' Position that the Revised Unbundling Rules Announced in the TRRO Must Be Implemented Through Amendments to ICAs Developed in Accordance with the Terms of Those Agreements

There is nothing in the TRRO that indicates the FCC intended for ILECs to be able to deviate from or terminate their obligations under their ICAs with ILECs without following the amendment processes specified in the ICAs (assuming FCC even has the authority to effectively amend contracts without the parties' mutual consent). To the contrary, it is clear that the FCC intended to for ILECs and CLECs to amend their ICAs to reflect the new impairment criteria specified in the rules announced in the TRRO, in accordance with the process contemplated by Section 252 and specified in the "change in law" provisions of the ICAs. Nothing in the TRRO supports a conclusion that the FCC intended for "change in law" amendment processes embodied in ICAs to be bypassed or overridden.

In ¶233 of the TRRO, the FCC articulated how the conclusions it reached in the TRRO were to be implemented by carriers:

> 233. We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that a failure of an incumbent LEC or a competitive LEC to negotiate in good faith under Section 252(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order, We encourage state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

Paragraph 233 is contained in Section VIII of the TRRO, "Remaining Issues", Subsection B, "Implementation of Unbundling Determinations". This section and subsection are separate and

apart from the TRRO sections announcing and explaining the FCC's substantive determinations concerning unbundling of Dedicated Interoffice Transport (§V), High-Capacity Loops (§V), and Mass Market Local Circuit Switching (§VI). It is clear, therefore, that the directives of ¶233 apply to all of the unbundling determinations made in the TRRO, both those pertaining to CLECs' access to new switching, high-capacity loop and transport UNEs, and those pertaining to transition of the CLECs' embedded base of customers served using these UNEs.

Paragraph 233 states that "We expect that incumbent LECs and competing carriers will implement the [FCC's] findings as directed by section 252 of the Act" – which, as discussed above, calls for a request for negotiation, negotiation of contract language, resort to dispute resolution processes (if needed), and finally, approval of the resulting contractual provisions by the applicable state commission. Indeed, the next sentence of ¶233 expressly refers to the obligation of both the ILEC and the CLEC to negotiate in good faith under Section 251(c)(1) of the Act – a reference that has relevance only in the context of an expectation that interconnection agreement amendments will be negotiated.[44] Paragraph 233 also states that "carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order." Further, ¶233 also states that, "*Thus*, the incumbent LEC and competitive LEC *must negotiate* in good faith regarding any rates, terms and conditions necessary to implement our rule changes." (emphasis added) It would be hard to envision a clearer directive that the rules changes announced in the TRRO must be implemented through amendments to the parties' ICAs developed in accordance with Sections 251 and 252 of the Act. Moreover, ¶233 is in no way

[44]Indeed, this reference is consistent with, and a continuation of, the FCC's admonition in the original TRO that "the section 251(c)(1) duty to negotiate in good faith applies to [the] contract modification discussions [necessary to implement the rule changes announced in the TRO], as they do under the section 252 process." TRO, ¶704.

consistent with SBC's contentions that the new impairment criteria announced in the TRRO are self-effectuating and "operative notwithstanding applicable interconnection agreements".

In ¶233 as well as elsewhere in the TRRO, the FCC did express the need for expedition in implementing its unbundling rules changes ("We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order"). However, the FCC also made it clear that the touchstone for achieving expeditious implementation of the new unbundling rules is the duty of both ILECs and CLECs to negotiate in good faith as required by Section 251(c)(1) of the Act.

The FCC's directive that the rule changes it announced in the TRRO should be implemented through negotiation of ICA amendments in accordance with Section 252 should not be surprising. The FCC is no doubt aware of the existence of "change of law" or "intervening law" provisions in virtually all ICAs and of the typical format of those provisions (which, as discussed above, parallels the process embodied in Sections 251 and 252 of the Act). There is no reason to expect that the FCC would fail to respect the binding nature of interconnection agreements, their importance to the parties' business plans and processes, and the need for orderly implementation of changes in accordance with the procedures specified in the contracts.

Moreover, the FCC's directive in ¶233 of the TRRO is fully consistent with, and a continuation of, its directive in the original TRO that the changes to unbundling rules it announced in that order were to be implemented through amendments to carriers' ICAs in accordance with their change of law provisions. In ¶¶700-701 of the TRO, the FCC made it clear that the changes to the FCC's unbundling rules were to be implemented through amendments to carriers' ICAs:

> 700. We recognize that many of our decisions in this Order will not be self-executing. Indeed, under the statutory construct of the Act, the unbundling

> provisions of section 251 are implemented to a large extent through interconnection agreements between individual carriers. The negotiation and arbitration of new agreements, and modification of existing agreements to reflect these new rules, cannot be accomplished overnight. **We recognize that many interconnection agreements contain change of law provisions that allow for negotiation and some mechanism to resolve disputes about new agreement language implementing new rules.** Although some parties believe that the contract modification process requires [FCC] intervention in this instance, we believe that **individual carriers should be allowed the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment, and to resolve disputes over any new agreement language arising from differing interpretation of our rules**. (footnotes omitted; emphasis added)
>
> 701. Thus, to the extent our decision in this Order changes carriers' obligations under section 251, **we decline the request of several BOCs that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions. Permitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252.** We do not believe that the lag involved in negotiating and implementing new contract language warrants the extraordinary step of the [FCC] interfering with the contract process. (footnotes omitted; emphasis supplied)

In ¶¶702-706 of the TRO, the FCC provided additional guidance as to how the ICA amendment process should be conducted, including directing the use of the Section 252 timetable as a default procedure in those instances where an ICA does not have specific change of law provisions; counseling that the Section 252 process provides guidance even where a change of law provision exists in the carriers' ICA; and urging that contract amendment negotiations proceed without undue delay in accordance with the Section 251(c)(1) obligation to negotiate in good faith.

Further, in footnote 2085 to ¶701 of the TRO, the FCC noted the position taken by several of the BOCs, including SBC, that the FCC may "negate" certain contract terms under the *Mobile-Sierra* doctrine. The FCC stated, however, that "Competitive LECs, however, have forcefully argued that the *Mobile-Sierra* doctrine does not apply to interconnection agreements

that are filed with the states." It is obvious from the FCC's conclusions in ¶701 that it found the CLECs' position to be persuasive.

In light of the fact that the TRRO is the FCC's order on remand from the Court of Appeals' decision affirming the TRO in part and vacating and remanding it in part, it makes sense that the FCC did not see a need to repeat in the same level of detail in the TRRO its conclusion that its unbundling rules changes should be implemented by carriers through the ICA amendment process. Consideration of ¶233 of the TRRO in the context of the FCC's predecessor order, the TRO, makes the FCC's intent in ¶233 of the TRRO even clearer. Certainly, with the considerable argument that transpired, prior to issuance of the TRO, over whether the FCC could "unilaterally change all interconnection agreements" to implement the TRO's unbundling rules changes, and the FCC's clear decision in the TRO *not* to do that, the FCC would have made a clear statement in the TRRO had it intended to "unilaterally change all interconnection agreements" to implement the TRRO's unbundling rules changes.

SBC has supported its position with assertions such as "The FCC has the authority to implement changes to unbundling requirements relative to items that are no longer deemed lawful pursuant to Section 251(c)." (See Ex. F to Complaint, p. 2) While that assertion is unremarkable – obviously, the FCC has the authority to amend its own rules – it in no way supports a contention that the FCC has the authority to abridge lawful, binding contracts, particularly where the contract contains its own mechanism for amendment in response to applicable FCC rule changes. Further, even if one assumes for discussion that the FCC has the authority to abridge contracts, ¶233 of the TRRO – particularly when considered in light of its predecessor order, the TRO – shows that the FCC has not chosen to exercise that putative authority with respective to the unbundling rules changes announced in the TRRO.

SBC has also made much of the fact that in the TRRO, the FCC ordered an effective date of March 11, 2005, for the unbundling rules changes, which is an earlier effective date than the normal effective date of 30 days following publication of amended rules in the Federal Register. (See Ex. F to Complaint, p. 2) The accelerated effective date, however, is also unremarkable. *Every* FCC order or rules change has an effective date, but that is not the same as the date that all activities associated with the order or rule change must be implemented. The date on which an FCC rules change becomes effective does not change the obligation of carriers to amend their ICAs in accordance with the contractually-specified processes (and Section 252 of the Act) before implementing the rules change.

McLeodUSA does not dispute that the FCC believes the new impairment criteria it adopted in the TRRO are important, and may have wanted to highlight the importance by specifying an earlier-than-normal effective date. Further, in specifying an earlier-than-normal effective date, the FCC may also have intended to force carriers to commence their ICA amendment processes promptly. However, the *specific* "good cause" that the FCC recited in the TRRO (as required by its own rules and by the federal Administrative Procedure Act[45]) for ordering an effective date earlier than 30 days after publication in the Federal Register, is simply that otherwise there would be a "gap" between the scheduled expiration of the interim rules the FCC put in place in its post *USTA II* Interim Order[46] and the normal effective date of the rules adopted in the TRRO. (TRRO, ¶236) This stated "good cause" for the earlier-than-normal

[45]47 C.F.R. §§1.103(a), 1.427(b); 5 U.S.C. §553(d).

[46]The post-USTA II Interim Order is *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, WC Docket 04-0313, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16783 (2004). "USTA II" is the U.S. Court of Appeals decision that affirmed in part and vacated and remanded in part the TRO. *United States Telecom Ass'n v. FCC*, 359 F. 3d 554 (D.C. Cir.), *cert denied*, 125 S. Ct. 313 (2004).

effective date in no way suggests that it was intended to over-ride contractual processes for amending ICAs in response to a change in law.

3. SBC's Actions Demonstrate That It Understands That ICA Amendments Are Necessary to Implement the TRRO's Rules Changes, But SBC Doesn't Really Want to Negotiate Amendments

SBC's position with respect to ICA amendments to implement the new impairment criteria announced in the TRRO is somewhat schizophrenic. Obviously, SBC understands and believes that amendments to its ICAs with CLECs are necessary in order to implement the unbundling rules changes – or else SBC would not have issued Accessible Letters with proposed ICA amendments relating to Mass Market ULS/UNE-P and unbundled high-capacity loops and dedicated interoffice transport shortly after issuance of the TRRO. In fact, it was clearly SBC's objective to have its proposed amendments executed prior to March 11, 2005, in order to obviate the impact of arguments that the entry into ICA amendments, rather than the mere effective date of the amended unbundling rules, controls the implementation of the amended rules under carriers' ICAs. For example, SBC AL CLECALL05-018, issued February 11, 2005 (see Ex. A to Complaint), pertaining to Mass Market Local Switching, stated:

> **Paragraph 233 of the Order requires good faith negotiations regarding implementation of the rule changes and implementation of the conclusions adopted in the Order. To facilitate both parties meeting this obligation, attached is a sample amendment to your Interconnection Agreement.** A signature-ready Amendment, along with instructions, will be available on CLEC-Online [web address] not later than February 21, 2005, for you to download, print, complete and return to SBC. **Please sign and return the Amendment to SBC by March 10, 2005, to ensure prompt implementation of the TRO Remand Order requirements**. (emphasis added)

Similarly, SBC AL CLECALL05-020, issued February 11, 2005 (see Ex. A to Complaint), pertaining to unbundled high-capacity loops and transport, stated:

> Also attached is a sample amendment to your Interconnection Agreement. A signature-ready Amendment and instructions will be available on CLEC-Online

> [web address] not later than February 21, 2005, for you to download, print, complete and return to SBC. **Please sign and return the Amendment to SBC by March 10, 2005. Paragraph 233 of the Order requires good faith negotiations regarding implementation of the rule changes and implementation of the conclusions adopted in the Order**. (emphasis added)

Additionally, in SBC's March 1, 2005 letter to McLeodUSA (Ex. C to Complaint), SBC stated:

> SBC has already provided you with proposed language to bring your ICA(s) into conformity with the FCC's new unbundling rules, as well as the transition plans and pricing for elements that no longer need to be unbundled, which will take effect on March 11, 2005. Signature-ready, printable versions of the amendments are available via the SBC CLEC Website [web address]. **The proposed language was derived directly from the TRO Remand Order, and thus should be implemented without delay, consistent with the [FCC's] admonition that the parties should not unnecessarily delay implementation of the new rules and the parties' obligation to negotiate in good faith**. Accordingly, we again request that you immediately access the proposed language on CLEC-Online, print the signature-ready amendment(s), execute and return them to SBC or provide proposed modifications as soon as possible **so that we may promptly reach agreement and file amendment with the appropriate state commission(s) in a timely manner**. (emphasis added)

Similarly, in its testimony filed in this case, SBC states that it "agrees with the CLECs that the interconnection agreements need to be amended to reflect current law" and that "The change of law provisions of the parties' ICAs will govern the process of amending the ICAs", but that "the ICA must be amended within the time period required by the TRRO." (SBC Ill. Ex. 1, p. 16)

Yet despite its repeated acknowledgement of the need to enter into conforming modifications to its ICAs with CLECs in order to implement the amended unbundling rules announced in the TRRO, SBC has also asserted that its refusal to accept orders for new ULS/UNE-P, unbundled DS1 and DS3 loops and unbundled DS1 and DS3 transport from McLeodUSA and other CLECs is "operative notwithstanding interconnection agreements or applicable tariffs." (See SBC AL CLECALL05-017 and 05-019 (Ex. A to Complaint).) Similarly, in its testimony prepared for this litigation, SBC asserts that the elimination of the

requirement to provide any new ULS after the effective date of the TRRO is "self-executing and requires no amendment to interconnection agreements." (SBC Il. Ex. 1, pp. 6-7)[47]

McLeodUSA submits that SBC's actions show it understands the FCC's requirement that carriers' ICAs must be amended in order to effectuate the revised unbundling rules announced in the TRRO, but that SBC does not really want to have to "negotiate" conforming amendments. This is manifested, for example, in SBC's March 1, 2005 letter to McLeodUSA (Ex. C to Complaint), in statements such as those quoted above (which amount to: "Sign and return SBC's form amendment at once so that we may reach agreement"), and the following:

> In [McLeodUSA's February 22 letter], you do not clearly state what other issues you believe you need to negotiate with SBC in the wake of the *TRO Remand Order*. If you have additional written language proposals to make relative to the *TRO Remand Order*, **separate and apart from the transition plan and pricing**, please forward them to me at your earliest convenience. However, **negotiation concerning such proposals should not delay implementation of the [FCC's] new unbundling rules and transition plans, which are covered by SBC's online proposed amendment**. (emphasis added)

SBC's one-sided view of the negotiation and amendment processes contemplated by the parties ICAs, Sections 251 and 252 of the Act and the TRRO should not prevail. What SBC has attempted here is not a "negotiation." Further, in the view of McLeodUSA (and other CLECs), there are many more points to be negotiated and incorporated into the ICAs in order to implement the TRRO than what is reflected in SBC's form amendment -- which essentially just

[47]SBC witness Chapman testified, "With respect to new UNE-P, nothing further is required after the effective date of the [TRO Remand] Order." (SBC Ill. Ex. 1, p. 7) Similarly, she stated that "no amendment is required to implement the FCC's directive that, effective March 11, 2005, CLECs may not obtain new unbundled High Capacity Loops or new unbundled Dedicated Transport within the wire centers and/or routes that meets the FCC's test for "non-impairment" or that exceeds the caps established by Rule 51.319(a) and Rule 51.319(e)." (*Id.*) This position is clearly inconsistent with SBC's proposed ICA amendments provided with AL CLECALL05-018 and 05-020, which include language stating that the CLEC may not obtain new ULS or UNE-P, or new DS1/DS3 loop and transport UNEs at non-impaired wire centers, after March 11, 2005.

says "the parties agree to follow the revised unbundling rules announced in the TRRO." There are also issues with SBC's proposed language. Nor is negotiation of the issues that need to be addressed in the amendments likely to be accomplished in less than 30 days, as SBC seems to have expected.

For example, McLeodUSA's Manager, Interconnection Negotiation testified that McLeodUSA has concerns both about the specific language and contents of SBC's proposed amendments and about TRRO topics that are not addressed in SBC's proposed amendment.[48] (McLeodUSA Ex. 2, p. 6) With respect to the first general area, McLeodUSA has concerns both with SBC's proposed incorporation of specific TRRO-related changes and with SBC's inclusion of language in its proposed amendment that is unrelated to the TRRO. SBC has included language that is outside the scope of the TRRO and is inconsistent with language in the parties' current ICA. (*Id*.) Without addressing whether it is appropriate at all for SBC to seek to amend the parties' ICA with respect to non-TRRO-related topics, there is certainly no reason to attempt to do so in the context of an ICA amendment intended to incorporate the new unbundling rules announced in the TRRO – particularly when it is SBC that is urging expeditious entry into an ICA amendment.

With respect to the second general area, SBC's proposed TRRO amendments are incomplete. They address aspects of the TRRO that are favorable to SBC and do not incorporate other aspects of the TRRO that are favorable to CLECs. (McLeodUSA Ex. 2, p. 7) However, all TRRO-related changes to the ICA should be negotiated together, not in a piecemeal fashion (contrary to the suggestion in SBC's March 1, 2005 letter), and should be reflected in a single amendment or contemporaneous set of amendments. (*Id*.) Additionally, there are some areas of

[48] As noted earlier, McLeodUSA has given SBC a comprehensive amendment to Appendix UNE of the McLeodUSA-SBC ICA addressing TRRO topics. (McLeodUSA Ex. 2, p. 5)

potential ambiguity under the FCC's new rules, and the parties should negotiate an ICA amendment that includes sufficient detail to eliminate these areas of potential ambiguity and thus avoid future disputes. (*Id*.)

One example is the identity of the wire centers that do and do not meet the new impairment criteria announced in the TRRO for unbundled DS1 and DS3 loops and transport. McLeodUSA's list, which was developed using a third-party data source (Dun & Bradstreet), does not agree with the list that SBC has published. (McLeodUSA Ex. 1, pp. 5-6; Ex. B to Complaint, p. 2) SBC's proposed form of amendment simply says that the CLEC is not permitted to obtain new "DS1/DS3 Loops in excess of the caps or to any building served by a wire center described in Rule 51.319(a))(4) or 51.319(a)(5), as applicable" or "DS1/DS3 Transport in excess of the caps or between any pair of wire centers as described in Rule 51.319(e)(2)(ii) or 51.319(e)(2(iii), as applicable", and thus leaves for future disputes exactly what those wire centers are in Illinois.[49] Presumably the discrepancies between the parties' wire center lists can eventually be resolved, but this should occur in the context of the ICA amendment rather than just creating an agreement to disagree later.

McLeodUSA is not suggesting that the Commission should decide in this case what the appropriate amendment(s) should be. McLeodUSA understands that that is not a purpose of this proceeding. Rather, McLeodUSA has identified its areas of concern with SBC's proposed TRRO amendments in order to illustrate that negotiating and effectuating an ICA amendment for the revised unbundling rules is not so simple (or one-sided) as just accepting SBC's proposed amendment language (or negotiating a few word changes to it). Instead, there are multiple, significant issues to be addressed in the amendment(s). (McLeodUSA Ex. 2, p. 8) This

[49]See Attachment to AL CLECALL05-020, included in Ex. A to Complaint.

complexity is manifested in the comprehensive nature of the proposed amendment to Appendix UNE of the parties' ICA that McLeodUSA has submitted to SBC. (*Id*.)

Moreover, that it will take some time to develop ICA amendments on complex topics such as those arising out of the TRRO is not unusual – lengthy negotiations of ICAs and amendments are consistent with experience. (See McLeodUSA Ex. 2, pp. 8-10) There is no reason to assume that the FCC does not know this. Although the FCC reminded both ILECs and CLECs of their Section 251(c)(1) obligations to negotiate the amendments in good faith, and urged carriers to do so expeditiously (as it should), there is no reason to believe that the FCC expected ILECs and CLECs to negotiate and reach agreement on all necessary amendments to their ICAs to effectuate the TRRO's new rules within approximately 30 days – and no basis for concluding the FCC expected carriers to "self-effectuate" the new rules before completing the amendment processes provided for in their contracts.

As the Commission concluded in its recent MCI-SBC Arbitration Order, the "intervening law" provisions of an ICA "should not, as SBC proposes, permit a party to unilaterally impose its own interpretation of an intervening law event." Rather, "Negotiations between the parties are essential to define the parameters of the law and translate them into contract language."[50]

Finally, SBC has contended that its Accessible Letter CLECALL05-039, issued March 11, 2005 (SBC Ill. Ex. 1.1) should moot the CLECs' allegations in this proceeding regarding unbundled high capacity loops and dedicated transport. (See SBC Ill. Ex. 1.1, pp. 8-11) It does not. Accessible Letter CLECALL05-039 indicates compliance by SBC with the "self-certification" process for ordering these UNEs specified in ¶234 of the TRRO. However, it does

[50] *MCIMetro Access Transmission Services, Inc., et al., Petition for Arbitration of Interconnection Rates, Terms and Conditions, and Related Arrangements with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Docket 04-0469, Order (Nov. 30, 2004), p. 23.

not resolve the more fundamental claim that SBC cannot unilaterally cease to provide new unbundled DS1 and DS3 loops and unbundled dedicated interoffice transport at wire centers that do not meet the new impairment criteria announced in the TRRO, until necessary amendments to the parties' ICAs are developed and approved.[51]

B. SBC Is Required to Continue to Provide "New" ULS or UNE-P to Serve CLEC "Embedded Base" Customers During the Transition Period Specified by the TRRO

In addition to the issue of SBC Illinois' obligation to continue to provide CLECs with access to ULS/UNE-P and unbundled DS1 and DS3 loops and transport in accordance with the terms of the parties' ICAs, a separate issue in this case involves SBC's obligation to provide "new" ULS/UNE-P to McLeodUSA and other CLECs for use in serving the CLECs' "embedded base" of customers that the CLECs serve with ULS/UNE-P.[52] Even if the TRRO's new unbundling rules with respect to Mass Market ULS and UNE-P were "self-effectuating" (which they are not, as shown above), the TRRO requires SBC to continue to provide access to these UNEs during the transition period to enable CLECs to serve their embedded base of customers. (See 47 C.F.R. §51.319(d)(2)(iii) adopted in the TRRO.) The dispute here boils down to whether, if an "embedded base" ULS/UNE-P customer of a CLEC requests additional lines or moves its home or business to a new location, SBC is obligated to provide the additional ULS/UNE-P needed to accommodate the request. SBC contends it is not required to do so. However, SBC's position is not supported by either the TRRO or common sense.

Section 51.319(d)(2) as adopted by the FCC in the TRRO state:

[51]McLeodUSA assumes that SBC is not suggesting that CLECs use the "self-certification" process to simply continue to order the loop and transport UNEs they are entitled to under their ICA without regard to the amended unbundling rules.

[52]The "embedded base" of customers refers to end users who were CLEC customers served using ULS/UNE-P as of March 11, 2005.

(i) An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops.

(ii) Each requesting telecommunications carrier shall migrate its embedded base of end user customers off of the unbundled local circuit switching element to an alternative arrangement within 12 months of the effective date of the Triennial Review Remand Order.

(iii) Notwithstanding paragraph (d)(2)(i) of this section, for a 12-month period from the effective date of the Triennial Review Remand Order, an incumbent LEC shall provide access to local circuit switching on an unbundled basis for a requesting carrier to serve its embedded base of end-user customers. [The pricing of ULS/UNE-P provided to serve the embedded base of end-user customers is described here.] Requesting carriers may not obtain new local switching as an unbundled network element.

Two things are apparent from this text. First, the obligation for ILECs to provide access to mass market ULS during the transition period applies to "the embedded base of end-user **customers**". SBC wants to treat this obligation as though it applies to "the embedded base of end-user **lines**" served using ULS/UNE-P, but the FCC's rule refers to "end-user customers", not to "lines". The plain meaning of the language used – "end-user **customers**" – demonstrates that SBC's position is unfounded. Second, in light of subpart (ii), which gives CLECs 12 months to migrate their embedded base of end-user customers from ULS to an alternative platform, the first sentence of subpart (iii) would have been unnecessary had the FCC intended the obligation to continue to provide ULS during the transition period to apply only to existing ULS lines, not to existing ULS customers. In other words, subpart (ii) already establishes that CLECs may continue to obtain existing ULS/UNE-P lines for up to 12 months while they transition existing customers to an alternative platform. Thus, the first sentence of subpart (iii) must mean something more than that CLECs can continue to use their existing ULS lines for up to 12 months – that is already stated in subpart (ii).

SBC no doubt relies on the last sentence of subpart (iii) – "Requesting carriers may not obtain new local switching as an unbundled network element" – as supporting its position that it is not obligated to provide any additional ULS/UNE-P lines to a CLEC to serve its "embedded base of end-user customers" during the transition period until those customers are migrated to an alternative platform. However, such a construction would no make sense in the context of §51.319(d)(2) read as a whole, as explained above. If the FCC in fact meant that ILECs are not obligated to provide additional ULS/UNE-P lines during the transition period to serve a CLEC's embedded base of end-user customers, the FCC would have articulated that intent through just subparts (i) and (ii). For §51.319(d)(2) to make sense in its entirety, the last sentence of subsection (iii) must be read and understood as a prohibition on access to ULS during the transition period for a CLEC to serve new customers.[53]

Common sense also supports McLeodUSA's position and demonstrates that SBC's position on this issue must be rejected. For example, under SBC's position, if an embedded base end-user customer wanted to add one or more lines at its home or office during the transition period, the CLEC would be required to provision those lines using a service platform other than ULS/UNE-P. McLeodUSA witness Patrick Herron detailed the difficulties this scenario would entail for both the CLEC and, more importantly, the customer, including potentially loss or limitation of features and degradation of the quality of service previously experienced, and expected by, the customer. (McLeodUSA Ex. 1., pp. 10-12; see §III.E.2 above.) It would be

[53]Additionally, ¶227 of the TRRO states, "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order." Given the use of the phrase "the embedded *customer* base", this sentence is internally consistent only if the "does not permit" portion is understood as prohibiting new UNE-P arrangements to serve *new customers*, not new UNE-P arrangements to serve embedded customers.

unreasonable to assume that the FCC – having established a transition period for an orderly migration of the CLEC's "embedded base of end-user customers" from ULS/UNE-P to another service platform – intended for this type of inconvenience and service degradation or disruption to be visited on either the carrier or, more importantly, the customers, by requiring a customer's additional or changed (e.g., due to a move to a new address) service needs to be served using a different service platform than the customer's current service platform. Indeed, the reason the FCC included a transition period for the embedded base of end-user ULS/UNE-P customers was to avoid a scenario that "could substantially disrupt service to millions of mass market customers, as well as the business plans of competitors." (TRRO, ¶226)

Accordingly, SBC Illinois should be required to continue to provide McLeodUSA with access to new ULS or UNE-P during the FCC's transition period if the new ULS/UNE-P is needed to meet the service needs of a McLeodUSA end-user customer who was served using ULS/UNE-P as of March 11, 2005. This requirement should continue until the embedded base customer is migrated to another service platform during the transition period.

C. SBC Illinois Continues to Have Obligations to Provide the Subject UNEs Pursuant to Section 13-801 of the PUA, the Commission's Implementing Order in Docket 01-0614, and SBC Illinois' Own Intrastate Tariffs on File with this Commission

Separate and apart from its obligations to continue to provide ULS/UNE-P, unbundled DS1 and DS3 loops and unbundled DS1 and DS3 dedicated interoffice transport to McLeodUSA under the terms of the parties' ICA until it is amended in conformance with the revised unbundling rules announced in the TRRO, SBC Illinois continues to have obligations to provide access to these UNEs pursuant to Section 13-801 of the PUA, the Commission's June 2002 Order in Docket 01-0614 implementing Section 13-801, and SBC Illinois' own intrastate tariffs that are on file with the Commission. Section 13-801, enacted in June 2001 (P.L. 92-0222), is

applicable to SBC Illinois as "a telecommunications carrier . . . subject to regulation under an alternative regulation plan pursuant to Section 13-506.1 of [the PUA]."[54] Section 13-801(d) requires such an ILEC to provide to any requesting telecommunications carrier access to network elements on an unbundled or bundled basis, for the provision of an existing or new telecommunications service, on just, reasonable and nondiscriminatory rates, terms and conditions. Section 13-801(d) also requires such an ILEC to provide combinations of network elements including the UNE-P.

SBC Illinois has on file with this Commission, and currently in effect, tariffs by which it offers ULS/UNE-P, unbundled DS1 and DS3 loops and unbundled DS1 and DS3 dedicated interoffice transport to telecommunications carriers – the same UNEs that are the subject of the TRRO. (Ill. C. C. No. 20, Part 19 (Joint Compl. Ex. 7)) These tariffs are expressly intended to comply with SBC Illinois' obligations under Section 13-801. (See Ill. C.C. No. 20, Part 19, Section 1, 8th Revised Sheet No. 1, included in Joint Compl. Ex. 7) SBC Illinois' tariffed offerings include Unbundled Loops (Section 2)[55], Unbundled Local Switching (Section 3), Access to 800 Data Base (Section 10), Access to Line Information Data Base (Section 11), Unbundled Interoffice Transport (Section 12), Access to AIN Databases (Section 13), Provision of Combinations of Network Elements (Section 15), Access to Customer Name Database (Section 17), and Unbundled Local Switching with Shared Transport (Section 21).

Section 5.7.2 of Appendix GT&C to the McLeodUSA-SBC ICA provides that "If **SBC-AMERITECH** has approved tariffs on file for interconnection or wholesale services, CLEC

[54]SBC has elected to be regulated pursuant to a plan of alternative regulation pursuant to Section 13-506.1 of the PUA. See *Illinois Bell Telephone Co.*, Dockets 98-0252, 98-0335 & 00-0764 (Cons.), Order, Dec. 30, 2002 (renewing and extending SBC's alternative regulation plan).

[55]Section 2 of the SBC Illinois tariff includes unbundled DS1 and DS3 loops, among others.

may purchase service from **SBC-13STATE** from this interconnection agreement, the approved tariffs or both in its sole discretion." (McLeodUSA ex. 3, p. 39)

SBC has contended in various venues that Section 13-801 of the PUA and the Commission's Order in Docket 01-0614 are pre-empted to the extent that they result in SBC being required to unbundle to a greater extent than SBC contends is required by federal law. However, at this time neither the Commission nor any court has declared that Section 13-801 or the Order in Docket 01-0614 are pre-empted. SBC is challenging its continuing obligation to provide ULS, UNE-P and related databases pursuant to Section 13-801, the Commission's Order in Docket 01-0614 and its implementing intrastate tariffs in both the currently pending remand proceeding in Docket 01-0614 and a currently pending lawsuit filed by SBC in the U.S. District Court for the Northern District of Illinois.[56] SBC's claims that these state law provisions are pre-empted by the federal Act and the FCC's unbundling rules adopted in the TRRO, to the extent that greater unbundling is called for under the state law provisions than under the federal provisions, will be resolved in one or both of these other proceedings. Therefore, there is no need to attempt to adjudicate these claims separately in this proceeding.[57] Moreover, with reference to the federal court proceeding, SBC has pledged that "until the court issues a ruling, SBC Illinois does not intend to reject orders for unbundled local switching and UNE-P to the extent the requesting CLEC has the right to purchase such "state law" UNEs under its existing

[56] *Illinois Bell Telephone Co. v. Hurley et al.*, Case No. 05 C 1149.

[57] On March 29, 2005, the U.S. District Court issued a Memorandum Opinion and Order in Case No. 05 C 1149 denying SBC's motion for a preliminary injunction.

ICA or tariff."[58] Nonetheless, there are two aspects of SBC's state law obligations that need to be addressed in this Order.

First, while McLeodUSA appreciates SBC's pledge to obey State law, this Commission's orders and its own tariffs, it nonetheless does not have the force of law and could be withdrawn at any time. Both SBC's Accessible Letters CLECALL05-017 and 05-018, announcing SBC's intention to reject orders for new ULS and UNE-P beginning March 11, 2005, and SBC's March 1, 2005, letter to McLeodUSA stating the same intention (see Exs. A and C to Complaint), were not qualified by any references to SBC's obligations under Illinois state law and its own tariffs. In light of these facts, the order in this case should find that SBC should continue to provide ULS/UNE-P to McLeodUSA so long as Section 13-801 and SBC's intrastate tariffs remain in effect, unless and until Section 13-801 has been declared invalid by a court, repealed or become inapplicable (i.e., SBC ceases to be regulated under a plan of alternative regulation), or withdrawal or modification of the tariffs has not been approved by the Commission.

Second, the provisions of Section 13-801 and SBC's own Illinois intrastate tariffs are not limited to ULS and UNE-P. Section 13-801(d) specifies that "The incumbent local exchange carrier shall provide to any requesting telecommunications carrier, for the provision of an existing or a new telecommunications service, nondiscriminatory access to network elements on any unbundled or bundled basis, as requested, at any technically feasible point on just, reasonable and nondiscriminatory rates, terms and conditions." Section 19 of Ill. C. C. No. 2, in its entirety, has been filed by SBC for the purpose of complying with SBC's obligations under the PUA including Section 13-801.[59]

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[58]SBC Illinois letter to McLeodUSA, March 11, 2005 (Ex. F to Complaint). See also SBC Ill. Ex. 1, pp. 12-13)

[59]Ill. C. C. No. 20, Part 19, Section 1, 8th Revised Sheet No. 1 (included in Joint Compl. Ex. 7).

Thus, SBC continues at this time to be obligated under Illinois law and its own intrastate tariffs to offer McLeodUSA (and other CLECs) unbundled DS1 and DS3 loops and dedicated interoffice transport, as well as ULS/UNE-P, even where such access would not be required under the amended unbundling rules adopted in the TRRO. Further, SBC's current federal court lawsuit seeks only to enjoin and have declared unlawful SBC's state law obligations to provide ULS and UNE-P. Accordingly, the order in this case should find that SBC must continue to provide unbundled DS1 and DS3 loops and dedicated interoffice transport to McLeodUSA pursuant to Section 13-801 and SBC's tariffs until and unless those specific obligations under Section 13-801 are repealed, declared unlawful or become inapplicable (i.e., SBC ceases to be regulated under a plan of alternative regulation), or until the relevant tariffs are canceled and withdrawn.[60]

D. SBC Illinois Continues to Have Obligations to Provide the Subject UNEs Pursuant to Section 271 of the Federal Act

Even if SBC's views on the impact of the amended unbundling rules announced in the TRRO were to prevail (which they should not, for the reasons discussed herein), SBC Illinois continues to be obligated to provide ULS, unbundled DS1 and DS3 loops and unbundled DS1 and DS3 unbundled dedicated transport to McLeodUSA, due to SBC's obligations under Section 271 of the federal Act (47 U.S.C.§271). That Section imposes on SBC an independent obligation to provide, and gives CLECs an independent right to obtain, these UNEs that SBC declared its intention to cease to provide beginning March 11, 2005, at the just and reasonable rates set forth in the parties' ICA.

[60]Further, at a minimum, any amendments to the provisions of the McLeodUSA-SBC ICA pertaining to access to UNEs in light of the amended unbundling rules announced in the TRRO must also take into account SBC's obligations under state law and its intrastate tariffs.

In order to obtain authorization to provide in-region, interLATA services under Section 271, SBC Illinois, as a BOC, was required to meet the conditions of that section of the federal Act. One of the central conditions of Section 271 is that a BOC enters into "binding agreements that have been approved under Section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities." (47 U.S.C. §271(c)(1)(A)) Those agreements must provide access to facilities that meet the requirements of the "competitive checklist" set forth in Section 271. (47 U.S.C. §271(c)(2)(A)(ii)) The items in the "competitive checklist" include access to unbundled local loops (47 U.S.C. §271(c)(2)(B)(iv)), to unbundled dedicated interoffice transport (47 U.S.C. §271(c)(2)(B)(v)), and to unbundled local switching (47 U.S.C. §271(c)(2)(B)(vi)). McLeodUSA's ICA with SBC expressly references Section 271, as well as Section 251(c)(3), as the source of SBC's obligation to provide McLeodUSA with access to UNEs and of McLeodUSA's entitlement to those UNEs. See Appendix UNE, Section 2.2 (McLeodUSA Ex. 5, p. 4) [61]

In ¶653 of the TRO, the FCC concluded that "the requirements of Section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251." However, the pricing standard for network elements required under Section 271 is that they be priced on a "just, reasonable and nondiscriminatory basis." (*Id*, ¶656) On review, the Court of Appeals in USTA II observed:

[61] Again, as with the provisions of Section 13-801 and SBC's intrastate tariffs, any negotiation and development of amendments to the UNE provisions of the McLeodUSA-SBC ICA in light of the TRRO must take into account SBC's obligations to provide the subject UNEs pursuant to Section 271.

> Checklist item two requires BOCs to provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 251(d)(1)," § 271(c)(2)(B)(ii), while checklist items four, five, six, and ten require the BOC to provide unbundled access to, respectively, local loops, local transport, local switching, and call-related databases, §§ 271(c)(2)(B)(iv)-(vi), (x). The FCC reasonably concluded that checklist items four, five, six, and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-52. In other words, even in the absence of impairment, BOCs must unbundle local loops, local transport, local switching and call-related databases in order to enter the interLATA market. (359 F. 3d at 588)

Finally, in its recent XO-SBC Arbitration Order, this Commission concluded that "Section 271 of the Federal Act creates an unbundling obligation to which SBC must adhere, irrespective of its duties under Section 251 and the associated impairment analysis."[62]

SBC's response to CLECs' claims that SBC continues to have an obligation to provide ULS/UNE-P, unbundled DS1 and DS3 loops and unbundled DS1 and DS3 transport pursuant to Section 271 is that any relief under Section 271 should be sought from the FCC and that states do not have authority to order unbundling pursuant to Section 271. (See, e.g., SBC March 1, 2005 letter to McLeodUSA (Ex. C to Complaint).) However, McLeodUSA has at least a colorable claim that SBC is required to provide the subject UNEs pursuant to its obligations under Section 271 and that McLeodUSA is entitled to obtain these UNEs pursuant to Section 271 under the terms of its ICA.[63] This Commission certainly has authority to resolve disputes arising under the terms of interconnection agreements, and in fact the McLeodUSA-SBC Illinois ICA gives either party the right to bring a dispute before the Commission (Appendix GT&C, Section 10.2.1

[62]*XO Illinois, Inc., Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*, Docket 04-0371, Order (Sept. 9, 2004, p. 47) ("XO-SBC Arbitration Order").

[63]Indeed, as explained above, the basis for a BOC's satisfaction of the Section 271 "competitive checklist" conditions in order to receive authorization to provide in-region, interLATA services is that it has entered into "binding agreements" to provide the services specified in the competitive checklist, including unbundled loops, unbundled local switching and unbundled transport.

(McLeodUSA Ex. 3, p. 56). In the XO-SBC Arbitration Order, the Commission expressly rejected SBC's position that the Commission lacked jurisdiction to require SBC and an ILEC to include in their ICA language governing access to Section 271 network elements, and further concluded that Section 271 obligations is an appropriate subject of ICA negotiations under Section 252(a)(1) of the federal Act.. (XO-SBC Arbitration Order, p. 47 note 43 and pp. 65-67)

The "Prohibited Actions of Telecommunications Carriers" under Section 13-514 of the PUA include "unreasonably impairing the speed, quality, or efficiency of services used by another telecommunications carrier", "unreasonably acting or failing to act in a manner that has substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers," and "unreasonably failing to offer network elements that . . . the Federal Communications Commission has determined must be offered on an unbundled basis to another telecommunications carrier in a manner consistent with the . . . Federal Communications Commission's orders or rules requiring such offerings" – all of which will transpire if SBC is allowed to cease providing the subject UNEs to CLECs despite its obligations under Section 271. Section 13-516(1) authorizes the Commission to cease and desist from violating Section 13-514. In fact, that is the specific relief McLeodUSA seeks in this case: an order directing SBC to cease and desist in implementing its announced intentions to unilaterally implement the amended unbundling rules announced in the TRRO before amendments to the McLeodUSA-SBC ICA have been developed and approved. Section 271 of the federal Act provides an additional basis for this Commission to conclude that SBC should be restrained from carrying out its unilateral actions.

Thus, the Commission's order in this case should conclude that SBC must continue to provide McLeodUSA with access to the subject UNEs pursuant to its obligations under Section

271 of the federal Act, at just and reasonable rates, terms and conditions. At this time, the only rates available for these UNEs is the rates under the McLeodUSA-SBC ICA, which this Commission has approved pursuant to Section 252; therefore, these rates should be treated as the just and reasonable rates between the parties for purposes of SBC's Section 271 obligations.[64] (SBC of course is free to take appropriate steps to establish different prices for these UNEs that it believes to be "just and reasonable.)

E. SBC Illinois Continues to Have Obligations to Provide the Subject UNEs Pursuant to the Conditions Imposed in the FCC's Order Approving the Merger of SBC Communications and Ameritech

Finally, SBC continues to have an obligation to provide ULS/UNE-P, unbundled DS1 and DS3 loops and unbundled DS1 and DS3 dedicated interoffice transport to McLeodUSA and other CLECs pursuant to one of the conditions imposed by the FCC in its 1999 SBC-Ameritech Merger Order. Specifically, paragraph 53 of Appendix C the SBC-Ameritech Merger Order states (14 FCC Rcd. at *15022):

> SBC/Ameritech shall continue to make available to telecommunications carriers, in the SBC/Ameritech Service Area within each of the SBC/Ameritech States, such UNEs or combinations of UNEs that were made available in the state under SBC's or Ameritech's local interconnection agreements as in effect on January 24, 1999, under the same terms and conditions that such UNEs or combinations of UNEs were made available on January 24, 1999, until the earlier of (i) the date the [FCC] issues a final order in its UNE remand proceeding in CC Docket No. 96-98 finding that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech in the relevant geographic area, or (ii) the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech in the relevant geographic area. This Paragraph shall become null and void and impose no further obligation on SBC/Ameritech after the effective date of a final and non-appealable [FCC] order in the UNE remand proceeding.

[64]However, this conclusion would be subject to the outcome of SBC's complaint in Docket 05-0171 in which SBC contends that the McLeodUSA-SBC ICA should be amended to require McLeodUSA to pay new UNE prices that SBC contends were approved by the Commission in Docket 02-0864.

The conditions imposed by the FCC in the SBC-Ameritech Merger Order are incorporated into the McLeodUSA-SBC ICA. Section 1.3 of Appendix Merger Conditions to the ICA (McLeodUSA Ex. 4) states: "The Parties agree to abide by and incorporate by reference into this Appendix the FCC Merger Conditions." Section 2.3 of Appendix Merger Conditions defines "FCC Merger Conditions" as "the Conditions for FCC Order Approving **SBC/Ameritech Merger**, CC Docket No. 98-141."

SBC has not disputed that this provision of the SBC-Ameritech Merger Order would require SBC to continue to provide the subject UNEs to McLeodUSA and other CLECs in Illinois, but SBC contends that its obligations under paragraph 53 are now "null and void" pursuant to the last sentence quoted above because a final and non-appealable order in the FCC's UNE Remand proceeding has been issued.[65] (See SBC March 11, 2005 letter to McLeodUSA (Ex. F to Complaint, p. 3).) SBC is incorrect. The FCC explained the purpose of this condition at ¶394 of the SBC-Ameritech Merger Order (14 FCC Rcd. at *14875-14876):

> Offering of UNEs. In order to reduce uncertainty to competing carriers from litigation that may arise in response to the Commission's order in its UNE Remand proceeding, **from now until the date on which the Commission's order in that proceeding, and any subsequent proceedings, become final and non-appealable**, SBC and Ameritech will continue to make available to telecommunications carriers each UNE that was available under SBC's and Ameritech's interconnection agreements as of January 24, 1999, even after the expiration of existing interconnection agreements, unless the [FCC] removes an element from the list in the UNE Remand proceeding or a final and non-appealable judicial decision that determines that SBC/Ameritech is not required to provide the UNE in all or a portion of its operating territory. (emphasis added)

The conditions imposed in the SBC-Ameritech Merger Order remain in effect because the successor proceeding to the UNE Remand proceeding – the TRO proceeding – remains

[65]The "UNE Remand Order" is *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, FCC 99-238, Third Report and Order and Fourth Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (rel. Nov. 5, 1999).

appealable. The UNE Remand Order was appealed to the U.S. Court of Appeals for the D.C. Circuit, and that court remanded the decision to the FCC in the USTA I decision.[66] The FCC then consolidated the UNE Remand proceeding into the TRO proceeding. (The caption for the TRO includes the UNE Remand proceeding, CC Docket 96-98.) Later, the appeals of the TRO were transferred to the same panel at the D.C. Circuit Court of Appeals because the order arose from the same proceeding.[67] Thus, as long as the TRO proceeding remains pending before the FCC or a court of appeals, the UNE Remand proceeding "and any subsequent proceeding" has not been terminated by a final, non-appealable order.

SBC Illinois therefore remains obligated pursuant to ¶53 of Appendix C to the SBC-Ameritech Merger Order and Section 1.3 of Appendix Merger Conditions of its ICA with McLeodUSA to provide all UNEs or combinations of UNEs that were made available in Ameritech's service territory in Illinois under its local interconnection agreements effect on January 24, 1999, including ULS, unbundled DS1 and DS3 loops and unbundled DS1 and DS3 dedicated interoffice transport. For SBC to fail to continue to provide these UNEs would be a violation of its ICA with McLeodUSA.

F. SBC's Unilateral Refusal to Provide ULS/UNE-P, Unbundled DS1/DS3 Loops and Unbundled DS1/DS3 Transport to McLeodUSA Will Have an Adverse Effect on McLeodUSA's Ability to Provide Service to its Customers and Will Impede the Availability of Telecommunications Services to Consumers

Certain of the "Prohibited Actions of Telecommunications Carriers" listed in Section 13-514 have an "adverse effect" component, in that for it to be established that a "prohibited action" under Section 13-514 has occurred, it must be shown that the respondent

[66] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("USTA I").

[67] See *Eschelon Telecom, Inc. v. FCC*, 345 F. 3d 682 (8th Cir. 2003); USTA II, 359 F. 3d at 562-64.

carrier's actions in question have an adverse effect of the type stated in the statute. The subsections of Section 13-514 that may be construed as including an adverse effect component include subsections (1), (2), (4), (5), (6) and (8):

> (1) unreasonably refusing or delaying interconnection or collocation or providing inferior connections to another telecommunications carrier;
>
> (2) unreasonably impairing the speed, quality or efficiency of services used by another telecommunications carrier;
>
> (4) unreasonably delaying access in connecting another telecommunications carrier to the local exchange network whose product or service requires novel or specialized access requirements;
>
> (5) unreasonably refusing or delaying access by any person to another telecommunications carrier;
>
> (6) unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers; and
>
> (8) violating the terms of or unreasonably delaying implementation of an interconnection agreement entered into pursuant to Section 252 of the federal Telecommunications Act of 1996 in a manner that unreasonably delays, increases the cost, or impedes the availability of telecommunications services to consumers.

As shown in Section III.E of this brief, if SBC is allowed to cease filling McLeodUSA's orders for new ULS/UNE-P (including new ULS/UNE-P to serve McLeodUSA's embedded base of end-user customers), unbundled DS1 and DS3 loops and unbundled DS1 and DS3 dedicated interoffice transport, before amendments to the McLeodUSA-SBC ICA are negotiated and put in place, McLeodUSA and its current and potential customers will suffer the adverse impacts referred to in subsections (1), (2), (4), (5), (6) and (8) of Section 13-514. The quality and efficiency of services used and provided by McLeodUSA will be adversely impacted, as will the speed with which McLeodUSA can fill new customers' orders (if it can fill them at all in certain SBC exchanges). McLeodUSA may be forced to cease offering service to and accepting orders

from new customers in some SBC exchanges, and may be forced to decline to renew existing customers' contracts as they expire in these exchanges. McLeodUSA will be required to provision new or moved lines for embedded base ULS/UNE-P customers using different service platforms, which will adversely impact the speed and efficiency with which McLeodUSA can fill such orders and the quality of service received by the customer. The inability to order additional DS1 or DS3 interoffice transport may adversely impact the quality of service McLeodUSA provides until alternative arrangements with SBC or other providers can be negotiated and entered into. Customers who today can look to McLeodUSA as a competitive alternative to service from SBC, particularly in Access Area C, will find that their ability to utilize this competitive alternative has been impeded (or eliminated altogether) and, if this competitive alternative continues to be available, that the cost has increased.

Other "Prohibited Actions of Telecommunications Carriers" listed in Section 13-514 are demonstrated simply by the occurrence of the prohibited action, without any further requirement that there be an adverse effect shown on the impacted carrier or on customers. These include the prohibited actions listed in subsections (10) through (12):

> (10) unreasonably failing to offer network elements that the Commission or the Federal Communications Commission has determined must be offered on an unbundled basis to another telecommunications carrier in a manner consistent with the Commission's or Federal Communications Commission's orders or rules requiring such offerings;
>
> (11) violating the obligations of Section 13-801; and
>
> (12) violating an order of the Commission regarding matters between telecommunications carriers.[68]

[68]SBC's unilateral actions of ceasing to provide certain UNEs before amendments to its ICA with McLeodUSA are negotiated and implemented would violate the Commission's order approving the ICA in Docket 02-0230, which had the effect pursuant to Section 252(e) of the federal Act of requiring the parties to adhere to the approved ICA.

As detailed in this brief, SBC's unilateral actions would constitute a "prohibited action" under each of subsections (10), (11) and (12). Further, all of SBC's actions and threatened actions as detailed in this brief would have an adverse impact on competition in the local exchange telecommunications markets in Illinois.

Accordingly, the record in this case as well as the applicable law shows that SBC's unilateral actions that are the subject of the complaints filed by McLeodUSA and the other complainants in these consolidated dockets would constitute "prohibited actions under Section 13-514(1), (2), (4), (5), (6) and (8) through (12) of the PUA.

V. REQUEST FOR PERMANENT RELIEF

For the reasons set forth in this brief, McLeodUSA Telecommunications Services, Inc., request that the Commission enter an order or orders in this proceeding granting McLeodUSA the following relief:

(1) The Commission should enter an order finding that SBC is violating the federal Act, the PUA and the ICA between SBC and McLeodUSA, as set forth in detail above, and that SBC is knowingly engaging in prohibited conduct set forth in Section 13-514(1), (2), (4), (5), (6), (8), (10), (11) and (12) of the PUA that has an adverse effect on competition;

(2) Pursuant to 220 ILCS 5/13-516(a)(1), the Commission should direct SBC to cease and desist violating the federal Act, the TRRO, the McLeodUSA-SBC ICA and the Commission's Order in Docket 02-0230 approving that ICA, and Section 13-801 of the PUA and SBC's own intrastate tariffs on file with the Commission, and not act upon the threats in its Accessible Letters and its March 1, 2005 and March 11, 2005 letters to McLeodUSA to cease providing certain UNEs and to raise the

rates on certain UNEs as of and after that date, prior to negotiation and approval of conforming amendments to the McLeodUSA-SBC ICA;

(3) To the extent necessary, pursuant to 220 ILCS 5/13-516(a)(1), the Commission should direct SBC to cease and desist violating its obligations under Section 271 of the federal Act and the conditions of the SBC-Ameritech Merger Order, which are incorporated into SBC's ICA with McLeodUSA, and not act upon the threats in its Accessible Letters and its March 1, 2005 and March 11, 2005 letters to McLeodUSA to cease providing certain UNEs and to raise the rates on certain UNEs as of and after that date, prior to negotiation and approval of conforming amendments to the McLeodUSA-SBC ICA and the determination, if necessary, of just and reasonable rates for those UNEs;

(4) Pursuant to 220 ILCS 5/13-516(a)(3), the Commission should direct SBC to pay the costs and expenses, including attorney fees, of McLeodUSA in this proceeding; and

(5) The Commission should grant such further or other relief to McLeodUSA as may be appropriate.

Respectfully submitted,

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by _____

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